No. 85-1084

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.,

Petitioners,

vs.

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Tenth Appellate District
Franklin County, Ohio

WILLIAM H. WALLACE
Counsel of Record
THOMPSON, HINE AND FLORY
1100 National City Bank Bldg.
Cleveland, Ohio 44114
(216) 566-5500
Counsel for Petitioner

MICHAEL A. CYPHERT
DAVID E. NASH
THOMPSON, HINE AND FLORY
1100 National City Bank Bldg.
Cleveland, Ohio 44114
(216) 566-5500
Of Counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE SUPREMACY CLAUSE TO THE UNITED STATES CONSTITUTION PROHIBITS STATE ACTION AUTHORIZING THE DEVELOPMENT AND OPERATION OF A COMMERCIAL REFUSE LANDFILL WITHIN THE BOUNDARIES OF A NATIONAL PARK?

TABLE OF CONTENTS

Question Presented for Review I
Table of Contents II
Table of Authorities III
Opinions Below 1
Jurisdiction 2
Constitutional Provisions Involved 2
Statutory Provisions Involved 3
Statement of the Case 5
Reasons for Granting the Writ 8

Federal Legislation Creating the CVNRA and Prohibiting Landfills Within National Parks Preempts Issuance of a Landfill Permit by OEPA .. 8

Congressional Power to Protect Federal Lands Under the Property Clause to the United States Constitution Includes the Power to Prohibit Commercial Landfills on Private Property Within the Boundaries of the CVNRA 13

Federal Regulation of Private Land Located Within the Boundaries of a National Park Does Not Constitute an Unlawful Taking Within the Meaning of the Fifth Amendment to the United States Constitution 15

This Case Raises a Question of Federal Law Which Should Be Settled by This Court 16

Conclusion 17

Appendix:

Order of the Supreme Court of Ohio (September 25, 1985) A1

Opinion of the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio (June 6, 1985) A2
Decision and Order of the Environmental Board of Revision (April 1, 1983) A27
Final Action of the Ohio Director of Environmental Protection (February 1, 1982) A62

TABLE OF AUTHORITIES

Cases

Camfield v. United States, 167 U.S. 518 (1897) 14
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 11
Hines v. Davidowitz, 312 U.S. 52 (1941) 11
Kleppe v. New Mexico, 426 U.S. 529 (1976) 13, 14
Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972) 11
Pennsylvania Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 15
Silkwood v. Kerr-McGee Corporation, 464 U.S. 238 (1984) 11
United States v. Alford, 274 U.S. 264 (1927) 14

Constitutional Provisions

U.S. CONST. art. IV, §3, cl. 2 ..... 3, 8
U.S. CONST. art. VI, cl. 2 ..... 2, 6, 10
U.S. CONST. amend. V 3, 15, 16

Statutory Provisions

16 U.S.C.A. §460ff (West Supp. 1985) 3, 6, 9, 11, 13
16 U.S.C.A. §460ff-1(a) (West Supp. 1985) 4, 8
16 U.S.C.A. §460L-22(c) (West Supp. 1985) .....*passim*

Legislative History

S. Rep. No. 1328, 93d Cong., 2d Sess. 120, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 6649, 6652 11
H.R. Rep. No. 98-1069, 98th Cong., 2d Sess. 2 (1984) 12
H.R. Rep. No. 98-1069, 98th Cong., 2d Sess. 3 (1984) ..12, 16
130 Cong. Rec. H9974 (daily ed. Sept. 24, 1984) (statement of Rep. Seiberling) 12

No.

In the Supreme Court of the United States

October Term, 1985

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.,

Petitioners,

vs.

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Tenth Appellate District
Franklin County, Ohio

The City of Independence and John J. Nicastro, Petitioners herein, respectfully petition for certiorari to review the judgment of the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio.

OPINIONS BELOW

The Order of the Ohio Supreme Court denying certification, entered on September 25, 1985, is unreported and

is reprinted at A1 of the Appendix. The opinion of the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio, entered on June 6, 1985, is unreported and is reprinted at A2 of the Appendix. The decision and order of the Ohio Environmental Board of Review, entered on April 1, 1983 is unreported and is reprinted at A27 of the Appendix. The final action of the Ohio Director of Environmental Protection, issued and effective February 1, 1982, is unreported and is reprinted at A62 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio, was entered on June 6, 1985. A timely motion to certify was denied by the Ohio Supreme Court on September 25, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Constitutional Provisions:

> The Supremacy Clause to the Constitution of the United States, art. VI, cl. 2:
>
> This Constitution and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The Property Clause to the Constitution of the United States, art. IV, §3, cl. 2:

The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

This case also involves the following provisions of the United States Code:

16 U.S.C.A. §460ff (West Supp. 1985):

For the purpose of preserving and protecting for public use and enjoyment, the historic, scenic, natural, and recreational values of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and for the purpose of providing for the maintenance of needed recrea-

tional open space necessary in the urban environment, the Cuyahoga Valley National Recreation Area, hereafter referred to as the "recreation area", shall be established within six months after December 27, 1974. In the management of the recreation area, the Secretary of the Interior (hereafter referred to as the "Secretary") shall utilize the recreation area resources in a manner which will preserve its scenic, natural, and historic setting while providing for the recreational and educational needs of the visiting public.

16 U.S.C.A. §460ff-1(a) (West Supp. 1985):

The recreational area shall comprise of the lands and waters generally depicted on the map entitled "Boundary Map, Cuyahoga Valley National Recreation Area, Ohio", numbered 655-90,001-A, and dated May 1978, which shall be on file and available for inspection in the offices of the National Park Service, Department of the Interior, Washington, District of Columbia, and in the main public library of Akron, Ohio, and Cleveland, Ohio. After advising the Committees on Interior and Insular Affairs of the United States Congress, in writing, the Secretary may make minor revisions of the boundaries of the recreation area when necessary by publication of a revised drawing or other boundary description in the Federal Register: *Provided*, that with respect to the property known as the Hydraulic Brick Company located in Independence, Ohio, the Secretary shall have the first right of refusal to purchase such property for a purchase price not exceeding the fair market value of such property on the date it is offered for sale. When acquired, such property shall be administered as part of the recreation area, subject to the laws and regulations applicable thereto.

16 U.S.C.A. §460L-22(c) (West Supp. 1985):

> In order to protect the air, land, water and natural and cultural values of the National Park System and the property of the United States therein, no solid waste disposal site (including any site for the disposal of domestic or industrial solid wastes) may be operated within the boundary of any unit of the National Park System, other than—
>
> (1) a site which was operating as of September 1, 1984, or
>
> (2) a site used only for disposal of waste generated within that unit of the park system so long as such site will not degrade any of the natural or cultural resources of such park unit.
>
> The Secretary of the Interior shall promulgate regulations to carry out the provisions of this subsection, including reasonable regulations to mitigate the adverse effects of solid waste disposal sites in operation as of September 1, 1984, upon the property of the United States.

STATEMENT OF THE CASE

This case raises the question of whether a state agency, acting pursuant to state law, may authorize the development and operation of a commercial refuse landfill within the boundaries of a national park, an area preserved by Congress for historic, scenic, natural and recreational purposes.

A. Procedural History.

This petition requests review of the decision rendered by the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio (the "Court of Appeals"), which

held that Respondent Ohio Environmental Protection Agency ("OEPA") could lawfully authorize Respondents Pete Boyas, Independence Development Sanitary Landfill, and Boyas Excavating, Inc. (collectively "Boyas") to develop and operate a commercial refuse landfill within the designated boundaries of Ohio's only national park—the Cuyahoga Valley National Recreation Area ("CVNRA"). The Court of Appeals' decision is directly contrary to the reservation of the permit site for park and recreational purposes by the United States Congress. Public Law 93-555, *codified at* 16 U.S.C.A. §460ff (West Supp. 1985). Moreover, the Court of Appeals' decision refused to apply Federal law that prohibits the operation of commercial refuse landfills within the boundaries of units of the National Park System. Public Law 98-506, *codified at* U.S.C.A. §460L-22(c) (West Supp. 1985).

The City appealed the issuance of the Permit by the OEPA to the Ohio Environmental Board of Review where the Permit was affirmed in part and vacated in part for engineering defects. Petitioners and Respondents all appealed to the Court of Appeals. On June 6, 1985, the Court of Appeals affirmed an order of the Environmental Board of Review which authorized the issuance of the landfill permit with only certain technical modifications. The City's motion to certify the case to the Ohio Supreme Court was denied without opinion on September 25, 1985.

Throughout the proceedings below, the City of Independence and John J. Nicastro, petitioners herein (collectively the "City") have consistently raised the issue of whether the inclusion of the Permit site within the designated boundaries of the CVNRA by Congress preempts the issuance of the landfill Permit by OEPA pursuant to the Supremacy Clause to the United States Constitution. U.S. CONST. art. VI, cl. 2. The City presented evidence to OEPA demonstrating that the Permit site was within

the designated boundaries of the CVNRA prior to the OEPA's issuance of a permit to Boyas on February 1, 1982 (the "Permit"). The controlling issue of Federal preemption was raised on appeal from OEPA's issuance of the Permit to the Ohio Environmental Board of Review in the City's Proposed Conclusion of Law No. 14, filed November 18, 1982, and was raised again on appeal to the Court of Appeals. *Assignment of Error No. 1.* Appendix at A5-6.

In addition, promptly after the enactment of 16 U.S.C.A. §460L-22(c), the City preserved the issue of Federal preemption with respect to that statute in the Court of Appeals by way of a supplemental brief filed February 20, 1985. Both Federal questions were presented to the Ohio Supreme Court in the City's Joint Memorandum in Support of Jurisdiction before the Ohio Supreme Court. At each level, the lower tribunals erroneously failed to apply superior Federal law and upheld the authority of OEPA to issue the Permit under state law.

B. Relevant Facts.

As expressly found by the trier of fact below (the Ohio Environmental Board of Review, see Appendix at A40), the Permit site and adacent areas where cover material for the garbage would be stripped are within the recognized boundaries of the CVNRA and the municipal boundaries of Independence. Boyas first acquired an option to purchase the Permit site by way of an agreement with the Hydraulic Press Brick Co., the owner of the Permit site and adjacent areas at that time, dated March 31, 1977. This agreement was entered into some three years after Congress first established the CVNRA to preserve the Cuyahoga Valley for park, recreational, and historical purposes. At this time the subject area was on the edge of lands to be included in the CVNRA.

As the result of further legislation by the Congress, the property was included within the boundaries of the CVNRA in late 1978 as depicted on the official Boundary Map, Cuyahoga Valley National Recreation Area, Ohio, No. 655-90,001A, dated May, 1978. Section 315, National Parks and Recreation Act of 1978, Public Law 95-625, *codified at* 16 U.S.C.A. §460ff-1(a). Boyas did not exercise his option to purchase the subject property until March 31, 1981—well after the property became part of the CVNRA. The Permit site, however, has not yet been acquired in fee by the United States.

Effective October 19, 1984, Congress enacted Public Law 98-506, *codified at* 16 U.S.C.A. §460L-22(c). Public Law 98-506 prohibits the operation of most commercial landfills within the boundaries of National Parks.

REASONS FOR GRANTING THE WRIT

This case raises a fundamental question regarding whether a state may directly contravene the reservation of land for public park uses by Congress pursuant to the Property Clause to the Constitution of the United States, art. IV, §3, cl. 2. This Court has never previously addressed this question and this is an appropriate case for review. The decisions of the lower and appellate courts of Ohio conflict with applicable decisions of this Court and with the clear intent of Congress in establishing the CVNRA and in prohibiting new landfills among units of the National Park System.

FEDERAL LEGISLATION CREATING THE CVNRA AND PROHIBITING LANDFILLS WITHIN NATIONAL PARKS PREEMPTS ISSUANCE OF A LANDFILL PERMIT BY OEPA.

The issuance of the Permit by OEPA, authorizing the construction and operation of the proposed commercial

refuse landfill within the boundaries of the CVNRA, directly contravenes Federal law in at least two respects. First, the issuance of the Permit thwarts Congressional objectives in establishing the CVNRA as articulated in Public Law 93-555, Section 1, *codified at* 16 U.S.C.A. §460ff (West Supp. 1985). This statute created the CVNRA expressly for the purpose of "preserving and protecting for public use and enjoyment, the historic, scenic, natural and recreational values of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and for the purpose of providing for the maintenance of needed recreational open space necessary to the urban environment . . ." *Id.*

Second, the issuance of the Permit is expressly prohibited by Section 2 of Public Law 98-506, *codified at* 16 U.S.C.A. §460L-22(c) (West Supp. 1985), which provides in pertinent part:

> (c) In order to protect the air, land, water and natural cultural values of the National Park System and the property of the United States therein, no solid waste disposal site (including any site for the disposal of domestic or industrial solid wastes) may be operated within the boundary of any unit of the National Park System, other than—
>
> (1) a site which was operating as of September 1, 1984, or
>
> (2) a site used only for disposal of wastes generated within that unit of the park system so long as such site will not degrade any of the natural or cultural resources of such park unit. . . .

Congress has in the above legislation expressed unequivocally its objective to protect all property within the boundaries of the National Park System from the devastating environmental hazards of commercial landfills.

Neither of the exceptions noted in 16 U.S.C.A. §460L-22(c) apply to the proposed Boyas landfill, as it is not yet in operation and because it would receive approximately 2,750 tons of industrial, commercial and municipal refuse daily, most, if not all, of which would be generated outside the boundaries of the CVNRA.

The issuance of the Permit by OEPA is preempted by both Federal statutes because it is impossible for the State of Ohio to authorize a landfill in the CVNRA without colliding directly with the clear purpose of Congress to preserve the Cuyahoga Valley for park and recreational uses and without flagrantly violating the express terms of 16 U.S.C.A. §460L-22(c).

The superiority of Federal law over conflicting state law or state action is essential to the functioning of our political system and the laws of this country. This honorable Court must not allow the State of Ohio, acting through OEPA, to flaunt Federal law by issuing a permit for a commercial refuse landfill on a site set aside by Congress for use as a national park.

The principle of Federal preemption is expressed clearly by the Supremacy Clause to the Constitution of the United States, art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

State action, such as OEPA's issuance of the Permit, which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is

unconstitutional under the Supremacy Clause. *Silkwood v. Kerr-McGee Corporation,* 464 U.S. 238, 248 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

The legislative history of each Federal statute compels a finding of Federal preemption. The Senate Report accompanying 16 U.S.C.A. §460ff emphasized "the importance of the Cuyahoga Valley not only for the historical value it contains, but for its potential to serve the outdoor recreation needs of the nearly five million residents of the surrounding area." S. Rep. No. 1328, 93d Cong., 2d Sess. 120, *reprinted in* 1974 *U.S. Code Cong. and Ad. News,* 6649, 6652. The decision by the Court of Appeals flies in the face of these express Congressional efforts to preserve the Cuyahoga Valley by creating Ohio's only national park. Statements of members of Congress respecting the intent and purpose of the laws Congress passes are entitled to great weight when questions of Congressional intent and purpose arise in the context of Federal preemption. *See Northern States Power Co. v. Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972).

Additionally, the legislative history of 16 U.S.C.A. §460L-22(c) emphatically discloses a concerned awareness of the destructive consequences of commercial landfills upon the lands within the designated boundaries of units of the National Park System. As reported by the Committee on Interior and Insular Affairs, to whom the bill was referred:

> There are currently three commercial waste disposal sites within park units at Gateway National

Recreation Area, Cape Cod National Seashore and Gettysburg National Military Park.

In addition there have been recent proposals to use land within other park units for waste disposal including the Cuyahoga Valley National Recreation Area.

The conditions of noise, air pollution, waste disposal in surrounding park lands, rat and other pest problems, and area disruption due to heavy truck use that are created by these waste disposal sites have resulted in a deep concern over the degradation of park values. H.R. Rep. No. 98-1069, 98th Cong., 2d Sess. 2 (1984); *see also*, 130 Cong. Rec. H9974 (daily ed. Sept. 24, 1984) (statement of Rep. Seiberling). . . .

In the Section-by-Section analysis of the bill, the House Committee further emphasized:

The Committee notes that the operation of solid waste disposal sites within units of the National Park System causes deterioration of air and water quality, increases levels of mechanical noise, and has the potential to degrade land and water areas that are in relatively natural condition and areas containing significant cultural values, and that the operation of such disposal sites renders adjacent lands, and waters, unfit for full public use and enjoyment.

H.R. Rep. No. 98-1069, 98th Cong., 2d Sess. 3 (1984). Without question, the authorization by OEPA of a new commercial landfill within Federal park boundaries is in direct conflict with the clearly stated Congressional purposes in enacting 16 U.S.C.A. §460L-22(c).

The City requests this honorable Court to grant the writ for purposes of upholding the Acts of Congress re-

ferred to herein when the Court of Appeals and the State of Ohio, acting through OEPA, have refused to do so. Under the Supremacy Clause, the courts of Ohio are bound by the Constitution and the laws of the United States. The decision of the Court of Appeals upholded the issuance of the Permit despite the clear expression of Congress embodied in 16 U.S.C.A. §460ff to preserve the Permit site as parkland within the CVNRA, and despite the clear prohibition embodied in 16 U.S.C.A. §460L-22(c). The Court of Appeals' decision is unlawful and blatantly ignores the duty imposed by the Supremacy Clause. The Permit cannot be allowed to stand in the way of Congressional efforts to preserve the natural beauty and historic value of the Cuyahoga Valley.

CONGRESSIONAL POWER TO PROTECT FEDERAL LANDS UNDER THE PROPERTY CLAUSE TO THE UNITED STATES CONSTITUTION INCLUDES THE POWER TO PROHIBIT COMMERCIAL LANDFILLS ON PRIVATE PROPERTY WITHIN THE BOUNDARIES OF THE CVNRA.

The Court of Appeals refused to find that the Permit was preempted by superior Federal law, in part, because the Permit site is not yet owned by the United States. Appendix at A8-9. This rationale is unsupportable since Federal regulation of privately owned lands is authorized by the Property Clause to the United States Constitution. *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976).

Consequently, the fact that the United States does not yet own the Permit site in the instant case does not

render the doctrine of Federal preemption inoperative. In fact, Congressional authority to establish and protect the CVNRA *compels* Federal preemption of the Permit. Congressional power to create national parks includes, by necessary implication, the limitation of new commercial or private activities on non-Federally owned areas to protect existing national parklands or to protect designated parklands for future acquisition. In *Kleppe*, *supra*, this Court noted that the right of Congress to regulate activity on public lands includes "congressional power to regulate conduct on *private* land that affects the public lands." *Id.* at 538 (emphasis in the original) (citing *Camfield v. United States*, 167 U.S. 518, 525-26 (1897)); *see also United States v. Alford*, 274 U.S. 264, 267 (1927) (Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests).

These principles have direct application to the CVNRA. Under the power derived from the Property Clause, Congress has clearly determined that a commercial enterprise such as a landfill within the CVNRA would conflict with the purposes for which the Area was established. Hence, any act of the State of Ohio which frustrates or conflicts with this Congressional purpose is unlawful under the Supremacy Clause of the United States Constitution.

FEDERAL REGULATION OF PRIVATE LAND LOCATED WITHIN THE BOUNDARIES OF A NATIONAL PARK DOES NOT CONSTITUTE AN UNLAWFUL TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Finally, the Court of Appeals erroneously concluded that Federal preemption of the issuance of the Permit by OEPA would constitute an unconstitutional taking under the Fifth Amendment to the United States Constitution. Appendix at A10. The Court of Appeals' decision on the taking issue is erroneous for at least two reasons. First, this holding conflicts directly with *Pennsylvania Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), wherein this Court held that land use restrictions, or the designation of land or buildings as places to be preserved for historic and aesthetic purposes *do not* constitute unconstitutional takings. Congress has clearly stated its objective in establishing the boundaries of the CVNRA to preserve the scenic, natural, historic and recreational beauty of the Cuyahoga Valley. To achieve this goal, private property owners within the national park may be denied the most profitable or beneficial use of their property—especially where, as in this case, the private property owner acquires the property knowing that the property is a designated part of a Federal park. *Id.* at 125.

Second, and equally important, however, is that the Court of Appeals erred in holding that the taking issue bears relevance to the preemption issue. The Supremacy Clause admits of no exceptions and the Court of Appeals was not free to fashion a private exclusion.

Under clear precedent of this honorable Court, the Court of Appeals erred in stating that Federal preemption of the Permit amounts to a taking in violation of the Fifth Amendment to the United States Constitution and erred by linking any taking issue to the paramount issue of Federal preemption. This court must not allow Federal legislation which created and regulates the CVNRA to be undermined by the Court of Appeals' misunderstanding of what constitutes an unconstitutional taking.

THIS CASE RAISES A QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals' holding below raises fundamental and far-reaching questions regarding Congressional ability to protect this Nation's dwindling park areas for future generations. After having spent over 100 million dollars of public funds to preserve the Cuyahoga Valley's scenic, historical and recreational values, the State of Ohio has attempted to render these efforts a nullity. If state sanctioned development is allowed to proceed, over 300 garbage trucks will traverse existing active park lands daily on their way to the proposed site, rendering, in the judgment of Congress, these ". . . lands, and waters, unfit for full public use and enjoyment". H.R. Rep. No. 98-1069, 98th Cong., 2d Sess. 3 (1984). Intervention by this Court is necessary to protect the CVNRA from commercial exploitation and to preserve paramount Congressional authority over these park lands.

CONCLUSION

For all the foregoing reasons, the Court should grant the petition and issue a writ of certiorari to the Court of Appeals, Tenth Appellate District, Franklin County, Ohio.

Respectfully submitted,

WILLIAM H. WALLACE
Counsel of Record
THOMPSON, HINE AND FLORY
1100 National City Bank Bldg.
Cleveland, Ohio 44114
(216) 566-5500
Counsel for Petitioner

MICHAEL A. CYPHERT
DAVID E. NASH
THOMPSON, HINE AND FLORY
1100 National City Bank Bldg.
Cleveland, Ohio 44114
(216) 566-5500
Of Counsel

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DENYING CERTIFICATION

(Dated September 25, 1985)

Case No. 85-1223

THE SUPREME COURT OF OHIO
COLUMBUS

CITY OF INDEPENDENCE, *et al.*,
Appellants,

v.

WARREN TYLER, DIR., *et al.*,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Thompson, Hine & Flory.

/s/ FRANK D. CELEBREZZE
Chief Justice

OPINION OF THE COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

(Rendered on June 6, 1985)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

CITY OF INDEPENDENCE,
Appellant-Appellee,
JOHN J. NICASTRO, on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE,
Appellant-Appellant,
v.
ROBERT H. MAYNARD, DIRECTOR OF ENVIRONMENTAL PROTECTION, *et al.*,
Appellees-Appellees,
PETE BOYAS, *etc.*,
Appellee/Cross-Appellant.

Nos. 83AP-403 & 83AP-424
(REGULAR CALENDAR)

CITY OF INDEPENDENCE,
Appellant-Appellant,
JOHN J. NICASTRO, on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE,
Appellant-Appellee,
v.
ROBERT H. MAYNARD, DIRECTOR OF ENVIRONMENTAL PROTECTION, *et al.*,
Appellees-Appellees,
PETE BOYAS, *etc.*,
Appellee/Cross-Appellant.

Nos. 83AP-404 & 83AP-423
(REGULAR CALENDAR)

OPINION

MESSRS. THOMPSON, HINE & FLORY, MR. WILLIAM H. WALLACE, MR. DAVID E. NASH, and MR. MICHAEL A. CYPHERT, *for City of Independence.*

MS. DEBORAH J. NICASTRO, *for John J. Nicastro.*

MR. ANTHONY J. CELEBREZZE, JR., *Attorney General,* and MS. JOAN M. CUMMINGS, *for Environmental Protection.*

MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A., MR. MICHAEL T. GAVIN and MR. ELI MANOS, *for Pete Boyas.*

APPEALS from the Environmental Board of Review.

MOYER, *J.*

This matter is before us on the appeal of the city of Independence, Ohio, and John J. Nicastro (appellants) from an order of the Environmental Board of Review (board) and upon the cross-appeal of Pete Boyas, Independence Development Sanitary Landfill and Boyas Excavating, Inc. (Boyas) from the same order of the board.

The Director of the Ohio Environmental Protection Agency (director) issued a permit to Boyas, which was effective February 1, 1982, permitting him to install a sanitary landfill in a site in Independence, Ohio, that consisted of thirty-one acres at the northwest corridor to the Cuyahoga Valley National Recreation Area (recreation area). The director also approved plans to install the sanitary landfill and granted waivers of Ohio Adm. Code 3745-27-06(I)(4) and (5). The area for which the permit was granted was a quarry in which shale mining was conducted by the Hydraulic Press Brick Company (Hy-

draulic). The pit from which the shale was taken was seventeen acres in area and two-hundred-twenty-feet deep, and had an estimated life of eight-to-ten years at a loading grade of 2,750 tons per day, operating on a six-day week. The waste to be deposited in the landfill was described as municipal, industrial and commercial waste.

The director's order was appealed to the board by appellants herein. The first appeal was dismissed upon the motion of the director and Boyas when it was learned by the director that the plans and the permit would have authorized deposition of solid waste material within two hundred feet of Hemlock Creek, in violation of Ohio Adm. Code 3745-27-06(I)(5), which requires a waiver under Ohio Adm. Code 3745-27-11.

Boyas submitted a second application, which was approved by the director and which was appealed by appellants herein. It is the appeal from the director's issuance of the second permit that is the basis of the appeal to this court. The permit site is located within the Cuyahoga River Valley, is wooded and contains a number of flora and fauna, two streams, one of which empties into the Cuyahoga River, and is surrounded by land that is used for educational, recreational, residential and commercial purposes. The closest home to the site is approximately eight hundred to one thousand feet, and the air in the neighborhood is reasonably clean and odor free.

After a hearing *de novo,* the board found that the director was not required to consider the social and economic impact of granting the permit; that the director has discretion whether to consider and evaluate separate and distinct governmental interests with respect to the property in question; that the landfill will not create a nuisance; that Ohio Adm. Code 3745-27-06(H)(2) and (3) were not vio-

lated when the director issued a permit to Boyas; and that the director's order did violate Ohio Adm. Code 3745-27-06(H)(4) because the facility will be incapable of operation in accordance with Ohio Adm. Code 3745-27-07, 3745-27-08, and 3745-27-09. The board's order on this issue is based upon its findings of fact with respect to Boyas' failure to incorporate a leachate collection system in the landfill property. The board further concluded that the requirements of Ohio Am. Code 3745-27-06(I)(4) and (5) and 3745-27-11(F), which permit the director to grant a waiver, were "suspect" because of the inadequacy of the leachate collection system, and the board therefore did not rule upon the propriety of the director's issuance of a waiver to Boyas; that the evidence did not establish compliance with Ohio Adm. Code 3745-31-05(A)(1), (2), (3), and (4); that the proposed landfill will prevent or interfere with the attainment or maintenance of ambient water quality standards in Hemlock Creek or the easterly and southerly tributaries of the Cuyahoga River; that the construction and operation of the landfill will be unlawful; that the discharge of other wastes from the settlement basin into the nearby waters without a valid permit and the alteration and obliteration of the existing channel of the easterly stream violate the permit provisions of Section 404(A) of the Clean Water Act, Section 1344, Title 33, United States Code; and that there was insufficient evidence to conclude that the director's action conflicted with "federal policy."

Appellants assert the following seven assignments of error in support of their appeal:

> "1. The Environmental Board of Review erred in concluding that Congressional legislation and the hearing record reflected insufficient evidence to estab-

lish that the Director of Environmental Protection's final action was inconsistent with and therefore preempted by, superior Federal law.

"The Environmental Board of Review erred in concluding that the Director of Environmental Protection could refuse to consider the social and economic impact of the landfill on the Cuyahoga Valley National Recreation Area and surrounding land uses and the actions of other governmental entities to preserve the Cuyahoga Valley for public park uses.

"3. The Environmental Board of Review erred in concluding, as a matter of fact and law, that the proposed landfill will not create an unlawful nuisance with respect to adjacent landowners and users of this Cuyahoga Valley National Recreation Area.

"4. The Environmental Board of Review erred in concluding that the applicant Pete Boyas, was not barred as a matter of law by Ohio Administrative Code Section 3745-27-06(H)(2), as a prior violator of Ohio environmental laws, from being granted a permit to install with respect to the proposed landfill.

"5. The Environmental Board of Review erred in concluding, on motion, that its prior vacation of a permit to install previously granted to the applicant with respect to the same permit area and proposed use, did not bar the Director of Environmental Protection's subsequent final action as a matter of law under the doctrine of *res judicata*.

"6. The Environmental Board of Review erred in failing to conclude that the waivers granted to the applicant pursuant to Ohio Administrative Code Section 3745-27-11 were unreasonable and unlawful.

"7. The Environmental Board of Review erred in concluding that the Director of Environmental Protection's final action should be vacated in part and affirmed in part, rather than vacated in its entirety."

In support of their first assignment of error, appellants argue that, because the permit site is within the geographical boundaries of the Cuyahoga Valley National Recreation Area, it violates a purported preemption that the United States government has regarding the use of the land within the recreation area. There is considerable testimony and other evidence in the record regarding the effect the proposed landfill would have upon the adjacent land that would be used as a recreation area. However, although it is apparent that Congress, in adopting Sections 460ff to 460ff-5, Title 16, United States Code Annotated, intended to preserve the thirty-two thousand acres of land designated as the recreation area, the question is whether Congress, in fact, complied with the strict test for preempting land use.

In determining that issue, we consider first the legislation by which the recreation area was created by Congress. The purpose for establishment of the recreation area was to preserve and protect for public use and enjoyment the historic, scenic, natural and recreational areas of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and to provide needed recreational open space in an urban environment. (*Id.* at Section 460ff.) The legislation then refers to a boundary map, a copy of which is a part of the record before the board, and states that the Secretary of Interior may make minor revisions of the boundaries of the recreation area when necessary:

"* * * *Provided,* That with respect to the property known as the Hydraulic Brick Company located in In-

dependence, Ohio, the Secretary shall have the first right of refusal to purchase such property for a purchase price not exceeding the fair market value of such property on the date it is offered for sale. When acquired such property shall be administered as part of the recreation area, subject to the laws and regulations applicable thereto." (*Id.* at Section 460ff-1[a].)

The Act specifically provides for the purchase or acquisition by gift of lands, improvements, waters or interests therein; a schedule by which the Secretary of Interior was to submit to Congress a plan which would indicate the lands and areas the secretary deemed essential to the protection and public enjoyment of the recreation area, the lands he had previously acquired, and an annual five-year acquisition program.

The Act also contains a reference to local zoning in the following words: "* * * In providing assistance pursuant to this subsection, the Secretary shall endeavor to obtain provisions in such zoning laws or ordinances which * * *" would have the effect of prohibiting commercial and industrial use of the real property adjacent to the recreation area and aid in preserving the character of the recreation area. (*Id.* at Section 460ff-3[f].)

Finally, Congress made it clear that it was not directing the secretary to violate the Fifth Amendment to the United States Constitution by acquiring property rights without giving reasonable compensation for such rights by authorizing the appropriation of over seventy million dollars "for the acquisition of lands and interests in lands." (*Id.* at Section 460ff-5[a].) At the time of the hearing before the board, the National Park Service had not exercised its right to purchase the permit area, even though the site had been transferred with the park service's knowl-

edge. Furthermore, a witness representing the National Park Service testified that there are many areas within the recreation area boundaries that the park service has no intention of acquiring and that such unacquired areas would not be administered by the park service unless they were acquired. He further testified that the park service had no intention of acquiring the Hydraulic property, that the park had no use for the pit and that he would not recommend acquiring the pit.

The United States Supreme Court observed, in *Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609, at 634, that the court had frequently indicated that:

> "'* * * Pre-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."' * * * [Citations omitted.] In cases such as this, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict. * * *"

The issue in *Montana, inter alia,* was whether a Montana severance tax on the mining of coal on federal land violated the Supremacy Clause in view of the impact of the severance tax upon royalty payments to the federal government. While the facts in *Montana* are not similar to the facts in this case, the general test stated in *Montana* should be applied to the federal statute and the facts in this case. When that is done, we conclude that the granting of a permit by the Director of the Ohio Environmental Protection Agency to a private company, to use land within the boundaries of an area designated by Congress as a national park where the land is not owned by the federal

government and the Act creating the park area does not expressly pre-empt the use of land for any purpose authorized by the state, does not violate Clause 2, Article VI, of the United States Constitution.

The cases cited by appellants in support of their argument do not require a finding that the Supremacy Clause has been violated in this case. Furthermore, a holding that a violation of the Supremacy Clause has occurred where no compensation has been paid for the land in question would violate the Fifth Amendment to the Constitution, which prohibits the taking of property without just compensation. That was not the effect of the holding in any of the cases cited by appellants. In fact, appellants have cited no express prohibition against the issuance of a permit for a landfill within the recreation area. While it is clear that the intention of Congress in establishing the recreation area was to preserve a scenic and somewhat historic condition, it is equally clear that Congress did not enact an express prohibition against state action.

Appellants have filed a supplemental brief arguing that the enactment by Congress of Public Law 98-506, effective October 19, 1984, and after this case was submitted to the court on the briefs and oral argument, specifically prohibits the operation of a solid waste disposal facility within the boundary of any unit of the National Park System.

The arguments raised in appellants' supplemental briefs are not persuasive for the following reasons:

1. We are confined to the record and the transcript of the proceedings below in determining whether the order of the Environmental Board of Review is supported by reliable, substantial and probative evidence and is in accordance with law.

2. The question before the Environmental Board of Review was whether the permit to install issued by the director complied with the environmental protection laws and regulations of Ohio and, to the extent they are applicable, of the United States. Neither the director nor the board has jurisdiction to prohibit the installation of a landfill for the reason that another government agency may object to such installation. See *City of Garfield Heights v. Williams* (Sept. 29, 1977), No. 77AP-449, unreported (1977 Opinions 3447) and *Little Miami, Inc. v. Williams* (Dec. 23, 1976), No. 76AP-292, unreported (1976 Opinions 4492).

3. The question of the applicability of a federal statute to the use of land within a federal park system and the question of the cession of authority from Ohio over lands not acquired by the federal government should be resolved in a proceeding initiated by the appropriate federal agency. The first assignment of error is not well-taken and is overruled.

In support of their second assignment of error, appellants argue that the director abused his discretion when he failed to consider the social and economic impact of his granting of the permit. Appellants argue that the director should have considered such nontechnical conditions as the opinions of other agencies, interference with recreational and educational activities within the park, and the preservation of historical sites in the recreation area. Appellants also wish the court to consider, specifically, the director's failure to follow the recommendation of the Ohio Department of Natural Resources and the master plan for the city of Independence, which recommended the phasing out of commercial and industrial uses in the Cuyahoga Valley. In disposing of the second

assignment of error, we observe first that R.C. 3745.011, by which the General Assembly enunciated the specific functions of the Environmental Protection Agency, says nothing with respect to the agency's responsibility to defer to local zoning ordinances, master plans, or the social and economic impact of the establishment of a landfill in any part of this state. The direction of R.C. 3745.011 is technical in nature, in that it is the Environmental Protection Agency's responsibility to conserve, protect and enhance the air, water and other natural resources of the state, and to prevent and abate pollution of the environment.

The director has adopted a number of rules to facilitate the implementation of the environmental protection laws of Ohio. One of the rules, Ohio Adm. Code 3745-31-05, states that the director, in considering whether to issue a permit to install a solid waste disposal facility, *may* take into consideration, *inter alia,* the social and economic impact of granting or denying the permit to install.

Appellants acknowledge that the director has no direct authority over the establishment of national parks, local zoning or surface mine reclamation. This court, in *Little Miami, Inc., supra,* at 4502, interpreted the predecessor to Ohio Adm. Code 3745-31-05 (EP 30-05) in reversing an order of the Environmental Board of Review which had vacated the director's order to permit the installation of a sewage treatment facility. In our opinion, we observed that:

> "* * * Moreover, the Director is required to coordinate environmental protection activities with various other agencies and to consider their plans and projects as part of a planning process. Such is a general procedure but is not a required determination each time a permit to install is issued. It remains the respon-

sibility of local zoning officials, commissions, boards of appeals, and courts to regulate the various social and economic concerns within the jurisdiction of particular subdivisions. Determination whether or not to grant or deny a permit to install a facility is predicated upon the impact of the proposed facility on the environment or public health. Zoning and pollution control are separate and distinct governmental interests, independently enforced and administered by different governmental units. The zoning issue, in particular, is separate and apart, and not the subject of this appeal."

The opinion recognizes, at least impliedly, that the direction of Ohio Adm. Code 3745-31-05(B)(3) is that the director is not required to, but may, take into consideration the social and economic impact of granting or denying a permit to install. Since the director is not required to consider such factors, he could not have abused his discretion, as argued by appellants, in failing to consider such issues. Furthermore, we are not convinced from our review of the record and the transcript before the board that the director failed to consider nontechnical factors in issuing the permit. There are a number of communications from the mayors of cities and villages in the area of the permit site urging him to grant the permit to alleviate a severe shortage of places to deposit waste. The director visited the site; there is testimony that the record of the public hearing was reviewed by the Chief of the Northeast District Office of the Environmental Protection Agency; and, finally, appellants were provided a *de novo* hearing by the board, at which twenty-eight volumes of transcript were produced. There is considerable testimony regarding the social and economic impact upon the community in the permit area that purportedly

will result from a granting of the permit. We find no error in the board's conclusion of law that the director is not required to consider the social and economic impact of the granting of a permit and that the director has discretion whether to consider and evaluate separate and distinct governmental interests. See *Little Miami, Inc., supra,* and *City of Garfield Heights, supra.* The second assignment of error is not well-taken and is overruled.

The question of whether a proposed landfill will create a nuisance is a question that attends virtually every request for a permit to install a landfill, because virtually every person would prefer not to live, or work or attend school near a landfill. However, every person in our society creates material waste that must be disposed of somewhere. It is in that context that the director and the Environmental Board of Review necessarily consider the issue raised by appellants' third assignment of error.

The board recognized this dilemma in its thirty-seventh finding of fact. After stating in its findings of fact that the operation of the proposed landfill may be offensive to the senses, may interfere with the comfortable enjoyment of life in adjacent property, and may affect a considerable number of persons by reason of the emission of noise from vehicles and equipment, and, after concluding that the control of blowing debris is not the best available current technology and that the production of methane gas at the site could create a serious hazard if produced in sufficient volume, the board concluded upon the evidence in the director's record and at the *de novo* hearing that the landfill will not create a nuisance. The reasons the board gave were that the site is isolated from residential structures and from the areas used by visitors to the recreation area, the close proximity of the site to industrial

and commercial enterprises and the board's assumption that Boyas would comply with the conditions in the permit designed to prevent a nuisance from occurring. The board's conclusions were apparently based, at least in part, upon its own view of the site. (See finding of fact 27 and Tr. XVI-204.) R.C. 3734.02(A) requires that the director issue licenses for solid waste facilities to assure that the facilities will not create a nuisance. Ohio Adm. Code 3745-27-01(N) defines nuisance as follows:

> "'Nuisance' means anything which is injurious to human health or offensive to the senses; interferes with the comfortable enjoyment of life or property; and affects a community, neighborhood, or any considerable number of persons (although the extent of annoyance or damage inflicted upon individual persons may be unequal)."

Our review of the transcript causes us to conclude that there is reliable, probative and substantial evidence upon which the board could conclude that the director's order would not create a nuisance, as defined in the Administrative Code and as applied by this court in *City of Garfield Heights v. Williams* (June 14, 1979), No. 78AP-683, unreported (1979 Opinions 1491). *Garfield Heights, supra,* is important to this case because of the distinction that can be made between the opinion in that case and the board's conclusions of law in this case. In *Garfield Heights,* we observed that the board had considered the economic impracticality of eliminating the nuisance created by the landfill to adjacent property owners. In this case, the board concluded that Boyas' compliance with the permit will provide protection against the creation of a nuisance and that the dust, noise, odors and blowing debris are controllable and will not be injurious to human health, or offensive to the senses, nor will they interfere

with the comfortable enjoyment of life and property, if the landfill is operated in accordance with the permit and other applicable laws and regulations. That conclusion is based upon reliable, substantial and probative evidence in the record that conflicted with some of the evidence offered by appellants. The third assignment of error is not well-taken and is overruled.

We observe at the outset of our disposition of appellants' fourth assignment of error that none of the parties has discussed the question of whether the board has the authority to adopt a rule such as Ohio Adm. Code 3745-27-06(H)(2), which on its face would prevent any operator of a solid waste facility who has previously violated a rule in even a minor way from operating any other waste facility in Ohio. We will therefore consider whether the board's order, which has the effect of finding that the director acted reasonably and lawfully in view of Ohio Adm. Code 3745-27-06(H)(2) and (3), is supported by reliable, probative and substantial evidence and is in accordance with law.

Ohio Adm. Code 3745-27-06(H)(2) provides that the director shall not approve any detail plans if the plans are submitted by a person who has previously operated or is currently operating one or more solid waste disposal facilities not in accordance with the applicable statutes and administrative rules. Subparagraph (3) requires that the person identified as the operator of a proposed solid waste disposal facility is competent and qualified to operate said facility. There is substantial evidence in the record to support the board's finding that Boyas complied with subparagraph (3). The chief of the northeast district office testified that Boyas had demonstrated the ability to operate a landfill in a competent manner. A district engineer for the northeast district office testified that he

made a number of visits to the Rockside Landfill, which had previously been operated by Boyas, and that the day-to-day operation of this landfill was reasonably well-organized, reasonably well-maintained and well-run. He also testified that there was a problem with odor, noise created by the equipment at the landfill, and some problem with blowing dust.

Appellants argue that because we held in *City of Garfield Heights v. Williams, supra,* that the granting of a permit to Rockside, which was operated by Boyas, would constitute the licensing of a nuisance, the director did not have the authority to grant Boyas a permit for the site herein. In *City of Garfield Heights,* the board had found that the original Rockside site was attracting birds and vermin and was technically creating a nuisance, but that it did not constitute a nuisance under the terms of R.C. 3734.02, when the efforts of Boyas to eliminate the nuisance and the economic realities of the need for an expanded landfill site were considered.

We first observe that a rule such as that in Ohio Adm. Code 3745-27-06(H)(2), which purports to strip the director of any discretion, is suspect for the reasoning found in *Dressler Coal Corp. v. Call* (1981), 4 Ohio App. 3d 81, wherein we observed that there is a very definite place for an administrative agency to use a case-by-case evaluation of statutory standards, in situations where there are circumstances which arise whereby an agency is justified in acting by individual order, rather than by general rule. Citing the United States Supreme Court, we stated, in *Dressler,* at 85, that " '[t]o insist upon one form of action to the exclusion of the other is to exalt form over necessity.' "

The rule in question would appear to be an example of the antithesis of such reasoning. Both the board and

this court, in *Garfield Heights*, observed that the operator (Boyas) had done everything he could to prevent and eliminate the nuisance that his landfill apparently created. In such a case it would appear that a mandatory rule saying, in effect, that such an operator can never operate another landfill is an example of the excesses that can be produced by administrative rule making. On the record before us, it cannot be said that the board's order affirming the director's interpretation of Ohio Adm. Code 3745-27-06(H)(2) is not supported by reliable, probative and substantial evidence and is not in accordance with law. The fourth assignment of error is not well-taken and is overruled.

Appellants' fifth assignment of error has no merit. The parties agree that the director initially issued to Boyas a permit to install and plan approval that would have authorized the deposition of solid waste into Hemlock Creek in violation of Ohio Adm. Code 3745-27-60(I)(5), as the creek was within two hundred feet of the proposed landfill site. That order was defective because it was issued without a waiver under Ohio Adm. Code 3745-27-11. When the director's order was appealed to the board and the director realized the defect in his order, he moved the board to vacate the order and it was vacated by the board.

New plans were then submitted by Boyas, which modified the design and eliminated the solid waste deposition within two hundred feet of Hemlock Creek. That proposal was approved by the director, who issued a new permit to install, a plan approval and a waiver of Ohio Adm. Code 3745-27-06(I)(4) and (5). Appellants appealed the new order and then filed a motion to dismiss with the board urging that the director's second order was barred by the doctrine of *res judicata*.

> "*Res judicata* embraces the doctrine of collateral estoppel which holds that when an issue of fact or law is determined by a valid judgment, the determination being essential to that judgment, that determination is conclusive against a party who attempts to relitigate the issue in a subsequent action, whether that subsequent action is with the opposing party in the first action, or is with another person. * * *" *Barthany v. Denton* (July 9, 1981), No. 81AP-73, unreported (1981 Opinions 2103, 2104).

It is important to emphasize in this case that no evidence was presented to the board and the board made no findings of fact or conclusions of law with respect to the first order which was the basis of appellants' motion to dismiss. While *res judicata* does apply to administrative hearings, it should be applied with flexibility and only where the administrative proceeding has been of a judicial nature and the parties have had an adequate opportunity to litigate the issues in the proceeding. See *Superior's Brand v. Lindley* (1980), 62 Ohio St. 2d 133.

In the case before us, the second permit to install was issued upon different facts than was the first permit to install. For that reason and because the parties had presented no evidence to the board when the director moved to dismiss the first appeal, the board did not err when it concluded that *res judicata* did not apply to the director's second order. In fact, if we were to adopt the reasoning argued by appellants, we would produce the anomalous result of penalizing an applicant for a new permit by holding that the director is bound by a mistake he made in issuing a previous permit to install, in a situation in which he subsequently took the initiative to correct his own error. The fifth assignment of error is overruled.

In support of their sixth assignment of error, appellants argue that the board erred when it did not rule upon the question of whether the director had properly granted waivers pursuant to Ohio Adm. Code 3745-27-06(I)(1), (4), (5) and 3745-27-11(F). The board deferred ruling upon that question because it found that it was impossible to evaluate the propriety of the granting of the waivers in the absence of a leachate collection system design as determined in other findings of fact by the board. In view of the reasons stated hereafter for overruling assignment of error number seven, assignment of error number six is overruled.

In support of their seventh assignment of error, appellants seem to argue that, if the board finds that the director's order is unlawful or unreasonable in any respect, the board must vacate the order in its entirety and that the board has no jurisdiction to affirm those parts of the order that it finds to be reasonable and lawful and order a modification of that part of the order that it finds to be unreasonable and unlawful. We have resolved that issue in *Citizens Committee v. Williams* (1977), 56 Ohio App. 2d 61, and in *Rings v. Nichols* (1983), 13 Ohio App. 3d 257, 262. In *Rings*, citing *Perry Township Trustees v. Earnhart* (Aug. 19, 1980), No. 80AP-16, unreported (1980 Opinions 2554), we held that the board may affirm that part of the director's order which it finds to be reasonable and lawful and may also modify another branch of the director's order. In *Rings*, we also placed importance upon the fact that the appellants, who were in the same legal status as the appellants in this case, benefited from the modifications in the director's order. In this case, the Board vacated the part of the director's order that failed to provide for an adequate leachate system and ordered the director to require Boyas to submit plans consistent

with the board's specific findings with respect to the leachate system. That act of the board is in appellants' interest. We hold that the board has the authority to enter such an order, and the seventh assignment of error is overruled.

Boyas, as cross-appellant, asserts the following four assignments of error in support of his cross-appeal:

> "1. The board erred in ruling that the action of the director in granting the permit was unlawful because the plans failed to provide for a leachate collection system.
>
> "2. The board erred in concluding that state and federal permits were required for the discharge of wastes into the waters of the state and the relocation of a drainage ditch.
>
> "3. The board erred in vacating the action of the director in granting the permit because it incorrectly found that the director had not complied with the criteria set forth in OAC §3745-31-05.
>
> "4. The board erred in concluding that the evidence established that the proposed landfill will violate all applicable state and federal laws."

The board received a considerable amount of testimony and evidence regarding the leachate collection system proposed by Boyas. The director may not issue a permit to install a solid waste disposal facility unless the information available to the director indicates that the facility will not prevent or interfere with the attainment or maintenance of applicable ambient water quality or air quality standards; that it will not result in a violation of any applicable laws, including the laws governing effluent standards, emission standards, and federal standards of

performance; that it will employ the best available technology; and that it will not cause significant degradation of the air or water.

We have reviewed the extensive evidence upon which the board concluded that the proposed landfill will, in fact, prevent or interfere with the attainment or maintenance of ambient water quality standards, as they apply to Hemlock Creek. Boyas refers to evidence that is contrary to the board's conclusion of law, but such evidence is much more general in nature than the evidence upon which the board's finding is made. We conclude that the board's conclusion of law, which is that the plans fail to include a leachate collection system using the best available technology, is supported by substantial, reliable and probative evidence. For example, the characteristics of the Chagrin shale constitute a significant fact in support of Boyas until the more specific observations and technical testimony are reviewed, as these indicate that the shale is permeable and that Boyas had performed permeability tests on the floor and sidewalls of the quarry and had not submitted detail plans regarding the sequency of the various pits he proposed to use.

Furthermore, the assertion of Boyas, that the board's order with respect to the leachate system in this case has the effect of issuing a regulation requiring that all solid waste disposal sites will generate leachate, and therefore they must all have a leachate removal system if plans are to be approved, is not persuasive. The board's conclusions of law are clearly confined to the facts of this case. The first assignment of error of the cross-appeal is overruled.

In support of his second assignment of error, Boyas contends that the board erred by concluding that the di-

rector should not have issued the permit until Boyas had obtained a National Pollutant Discharge Elimination (NPDES) permit for the discharge of water and wastes from the settling basin and that Boyas should have been required to obtain a permit pursuant to Section 404(a) of the Clean Water Act, Section 1344, Title 33, U.S. Code.

Ohio Adm. Code 3745-33-02 requires that a person who proposes to discharge any pollutant into the waters of Ohio must obtain an Ohio NPDES permit before creating such discharge. An application must be filed at least one hundred eighty days prior to the commencement of the proposed discharge. There is testimony in the record that Boyas and the director had agreed that the permit would not be issued until the nature of the discharge could be determined. We find nothing in the statutes or in the administrative regulations requiring the agency to have issued an NPDES permit at the same time it issued the permit to install. The director's order with respect to this limited issue was reasonable and in accordance with law. The first branch of Boyas' second assignment of error is sustained.

The board concluded that the construction and operation of the landfill will be unlawful without the issuance of a permit, with respect to the alteration of the easterly stream of Hemlock Creek into a drainage ditch. The stream will be relocated to provide drainage from the landfill site. Under Section 1344, Title 33, U.S. Code, Boyas would be required to obtain a permit for the dredging of the stream if it is "navigable," as that term is defined in Section 1362(7), Title 33, U.S. Code. The stream was relocated in order to provide for the diversion of surface waters from the landfill site. Navigable waters are defined as "the waters of the United States, including the territorial seas." Under that broad definition, it would appear

that the easterly stream, although it is obviously a very small stream, is a navigable water for purposes of the Clean Water Act. We further assume, because neither the director nor Boyas has argued otherwise, that the easterly stream is technically water of the United States, rather than the state of Ohio or some other political subdivision. The board's conclusion of law number eighteen is supported by substantial reliable and probative evidence and is in accordance with law, and the second branch of Boyas' second assignment of error is overruled.

The third assignment of error of the cross-appeal is overruled. In conclusion of law number thirteen, the board found that the permit does not require compliance with the criteria described in Ohio Adm. Code 3745-31-05 (A)(1), (2), (3) and (4).

Boyas argues that the plans he submitted with his application for a permit indicate that erosion control will be produced by a dam and that the site is under the jurisdiction of the Division of Reclamation of the Department of Natural Resources and is therefore controlled to the extent required by the environmental protection laws. However, the director's order does not appear to be based upon Boyas' compliance with the mining laws of Ohio, and we are unable to find in the record before the director evidence that would contradict the evidence produced in the hearing before the board, which evidence indicates that drainage and the condition of the overburden have not been properly provided for in the permit. The order of the board is therefore supported by reliable, probative and substantial evidence, and the third assignment of error is overruled.

Ohio Adm. Code 3745-27-06(H) provides that the director shall not approve any detail plans or specifications

unless he determines that the establishment or modification in operation of a solid waste disposal facility will not create a nuisance or a health hazard, will not cause water pollution, and will not violate any regulations adopted by the director under R.C. Chapter 3704. In support of his fourth assignment of error, Boyas seems to argue that the findings of fact upon which the board based its conclusion of law number seventeen are either matters that should be postponed until the facility is in operation or else are not supported by the evidence. Boyas submits that conclusion of law seventeen is based upon findings of fact numbers twenty-six, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-four, forty, forty-one, forty-two and forty-three. We reviewed all the findings of fact and the evidence in support of the findings, and we conclude that, while Boyas may disagree with the propriety of specific findings of fact, the board's order is supported by probative and reliable evidence. It is apparent that the board found that the director's order simply left some matters, such as the second pit, drainage and erosion control in and around the secondary cover material areas, to a later time. Furthermore, the director apparently did not require sufficient test borings regarding the secondary cover material and failed to account for unacceptable materials in determining the amount of overburden materials that was available at the permit site. The requirements imposed by the board's conclusion of law and findings of fact will simply make the permit comply with the laws and regulations related to solid waste disposal facilities with much more specificity and much greater assurance to all concerned that the facility will be installed and operated in a manner that assures compliance with all applicable state and federal laws. The fourth cross-assignment of error is not well-taken and is overruled.

For the foregoing reasons, the order of the Environmental Board of Review is affirmed, except to the extent that we have sustained Boyas' second cross-assignment of error.

Judgments affirmed, except to the extent that the second cross-assignment of error is sustained.

STRAUSBAUGH and MCCORMAC, JJ., concur.

DECISION AND ORDER OF THE ENVIRONMENTAL BOARD OF REVIEW

(Issued April 1, 1983)

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW
STATE OF OHIO

CITY OF INDEPENDENCE

and

JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE

and

JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMOWNERS-CITIZENS ASSOCIATION, INC.

Appellants,

v.

ROBERT H. MAYNARD, DIRECTOR OF ENVIRONMENTAL PROTECTION

and

PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.

Appellees.

Case No. EBR 18828

Case No. EBR 18829

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER

Issued by:

THE ENVIRONMENTAL BOARD OF REVIEW
Thomas M. Phillips, Chairman
James L. Baumann, Vice-Chairman
250 East Town Street
Room 101
Columbus, Ohio 43215
Telephone: 614/466-8950

COUNSEL FOR APPELLANT
CITY OF INDEPENDENCE

William H. Wallace, Esq.
Michael A. Cyphert, Esq.
Thompson, Hine and Flory
1100 National City Bank Building
Cleveland, Ohio 44114

COUNSEL FOR APPELLANT
JOHN J. NICASTRO, ET AL.

Deborah J. Nicastro, Esq.
840 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113

COUNSEL FOR APPELLEE
ROBERT H. MAYNARD, DIRECTOR

Edward D. Hayman, Esq.
Joan M. Cummings, Esq.
Assistant Attorney Generals
Environmental Law Section
30 East Broad Street - 17th Floor
Columbus, Ohio 43215

COUNSEL FOR APPELLEE
BOYAS EXCAVATING, INC.

Michael T. Gavin, Esq.
Eli Manos, Esq.
Mansour, Gavin, Gerlack & Manos Co., L.P.A.
2150 Illuminating Building
Cleveland, Ohio 44113

This appeal is from the final action taken by the Director of the Ohio Environmental Protection Agency (the "Ohio EPA") in: (a) issuing a permit to install ("PTI") for a sanitary landfill; (b) granting approval of plans to install a sanitary landfill; and (c) granting a waiver, of O.A.C. 3745-27-06(I)(4) and (5), to Appellee Mr. Pete Boyas, Boyas Excavating, Inc. (the "Applicant"). The approval of the plans and grant of the permit to install a sanitary landfill were signed by the Director, Appellee Wayne S. Nichols, effective February 1, 1982. [Certified Record ("C.R.") #1.]

The permit site for the proposed sanitary landfill consists of thirty-one (31) acres of land located southeast of the intersection of Stone and Hemlock Roads in the City of Independence, Ohio. The area is a quarry presently being mined for shale by the Hydraulic Press Brick Company ("Hydraulic"). Hydraulic processes the shale into a lightweight aggregate product, known as hadite, at facilities located contiguous to the permit site. The existing pit is approximately 17 acres in size and 225 feet deep. The application for a PTI lists the usable volume of the proposed landfill at 3,787,114 cubic yards with an estimated life of 8-10 years at a loading rate of 2,750 tons per day and operating six days per week. The amount of waste to be accepted is listed as 1,750 tons per day municipal

(63.9%); 500 tons per day industrial (18.2%) and 500 tons per day commercial wastes (18.2%).

The Appellants are City of Independence, a political subdivision of the State of Ohio and John J. Nicastro, a property owner and an elected councilman in the City of Independence. [Transcript of Proceedings ("Tr.") IX-147a-148.] Mr. Nicastro also appeared as a representative for the Save Our Independence Land Committee and the Independence Homeowners-Citizens Association, Inc., groups consisting of Independence residents. (Nicastro Tr. IX-149-154.) Each of the Appellants assert that they will be aggrieved or adversely affected by the final action of the Director. All Appellants are properly before the Board and have standing to appeal the Director's actions.

On February 1, 1982 the Director of the Ohio EPA issued as final actions, not preceded by a proposed action or an opportunity to request an adjudication hearing a PTI, plan approval and a waiver to the Applicant. (C.R. #1 and 6.) The permit approval indicates that the revised Application (C.R. #3) was received November 30, 1981. The Director caused notice of his final actions to be published in a newspaper of general circulation in Cuyahoga County on February 17, 1982. (C.R. #5.) Notice of his final actions appeared in the Ohio EPA *Weekly Review* for the week of February 16, 1982. (C.R. #4.) Timely appeals to the Director's actions were filed by the City of Independence and John J. Nicastro, et al. and the appeals were consolidated by order of the Board on March 15, 1982. The Appellants' appeal assigned numerous Objections and Assignments of Errors that challenged the reasonableness and lawfulness of the Director's final actions, which are summarized as follows:

a. The landfill will constitute a nuisance;

b. the landfill will constitute a health hazard;

c. the landfill will cause or contribute to water pollution;

d. the landfill is located within the designated boundaries of the Cuyahoga Valley National Recreation Area ("CVNRA");

e. the landfill use is inconsistent with the approved reclamation plan for the area issued by the Division of Reclamation, Ohio Department of Natural Resources ("Division of Reclamation");

f. the City's zoning does not permit a landfill in the area;

g. Peter Boyas ("Boyas") did not properly close the Rockside Reclamation Landfill, a landfill heretofore operated under his supervision;

h. Boyas had operated the Rockside Reclamation Landfill in violation of EPA regulations;

i. the landfill is inconsistent with the area-wide waste management plans announced by the Cuyahoga County Board of Commissioners;

j. the area from which cover is to be obtained contains historic Indian artifacts;

k. the Applicant failed to obtain a surface mining permit from the Division of Reclamation to excavate cover material;

l. the landfill will unlawfully contribute to air pollution;

m. the United States Geological Survey shows the landfill is a sand and gravel pit;

n. the solid waste disposal area is located less than 200 feet from several streams, and waiver of O.A.C. 3745-27-06(I)(5) was unreasonable and unlawful;

o. the solid waste disposal area is within 1,000 feet of water wells, and waiver of O.A.C. 3745-27-06 (I)(4) was unreasonable and unlawful;

p. air pollution from the landfill will cause a nuisance;

q. Boyas is incompetent and unqaulified to operate a landfill;

r. the landfill will have adverse social and economic impacts upon the surrounding community;

s. there is inadequate access to the landfill;

t. the Cuyahoga County Court of Appeals in the case of *Cleveland Electric Illuminating Company v. Scapell,* 44 Ohio App.2d 13 (1975) has declared commercial enterprises unlawful in the designated area of the CVNRA;

u. the Director's action authorizes alteration and modification of navigable waters in violation of the Rivers and Harbors Act of 1899;

v. the United States Department of the Interior, National Park Service ("Park Service") has not approved the access road to the landfill;

w. the required waste traffic access route is via the Stone Road bridges, which are inadequate;

x. the landfill will utilize property not owned or controlled by applicant;

y. the landfill permit imposes too many conditions to be valid; and,

z. during the hearing, Appellants raised the issue that the solid waste disposal area was in the floodplain of the Cuyahoga River and Hemlock Creek.

Through motion, the Appellants have separately alleged that under the doctrine of *res judicata*, the Board's previous general vacation of the Director's final action regarding the same permit site prohibited the Director from proceeding a second time. The Board denied the Appellant's Motion by order dated May 11, 1982. During the course of the hearing the Appellants also raised the issue as to whether the permit site is within a floodway or regulatory floodplain in violation of the Ohio EPA's regulations.

In addition, the Board received a Motion from the Applicant to overrule Appellants' Assignments of Error numbers: 4, 5, 6, 8, 9, 10, 11, 20, 21 and 22. On May 11, 1982 the Board granted the Motion to Overrule Objection and Assignment of Error No. 6, regarding the issue of zoning, since prior cases have held that the Ohio EPA may proceed with its own deliberations notwithstanding unresolved or contrary zoning applications to the site under consideration. With regard to the remaining Motions to overrule, the Board determined that testimony would be required to clarify the apparent jurisdictional disputes and reserved ruling on these motions until after they were addressed at the *de novo* hearing. A *de novo* hearing was held in this matter commencing September 21, 1982 and continuing for eighteen hearing days. Both parties presented extensive evidence and submitted numerous exhibits in support of their respective positions.

FINDINGS OF FACT

In summary, the Board is affirming the order in part and vacating the order in part. No workable leachate collection system has been designed or is planned for installation, hence obviously it is inadequate as to the first pit. The second and succeeding pits likewise have no provision for a leachate collection system. Generally, such would consist of a peripheral collector system around each phase of a plan plus a central collection and disposition area as well as ready access for maintenance. The Board has found that the plugging process for the seeps in the first phase will not work as the enormous settling characteristics of this deep pit will shear off any paste-on plugging effort. The testimony overwhelmingly shows that at least two later phases are planned within the permitted area in addition to the existing pit. Yet, access to these phases, the elevations, both initial and final, the manner of excavation and development, as well as other elements such as drainage and erosion control, potential leachate collection systems and the other aspects of a descriptive plan simply have not been prepared and do not exist for these phases. Accordingly, although the permit area is large the plans address only approximately one-third of the permit area and do not address the remaining portions. To this extent, the Board finds that the Director's decision must be vacated. Finally, there is no provision in any of the phases for drainage or erosion control of the stockpiled cover material nor in fact are the areas depicted in the plans where the stockpiled materials are to be stored. The testimony establishes that the area for stockpiling will most likely be on property not owned by the applicant, the whereabouts of which is undetermined.

1. Boyas' first formal application and plans were submitted to the Ohio EPA's central office on approximately May 18, 1978. (C.R. #156.) A number of deficiencies were noted by Mr. Redman (McKinney Tr. XI-14-16) and the plans were returned; several other exchanges followed. [McKinney Tr. XI-17; C.R. #145; C.R. #146; McKinney Tr. XI-18-21.] For example, the Applicant was advised that the distance between the landfill and the residential dwellings on Hillside Road was less than the recommended minimum 1000 foot isolation distance. (McKinney Tr. XI-18.) A response was submitted by Mr. Coburn dated February 22, 1979. (C.R. #142.)

2. Further revision to the working drawings and attendant documents elicited additional concerns, by Clark, in the form of criticisms and questions regarding inadequately addressed issues in the plans. [Clark Tr. I-33-108; C.R. #44, 78 and 109; McKinney Tr. XI-34-37.] In particular, Clark was concerned that the suitability and availability of cover material, proper zoning, proper access and failure to design the installation of a leachate collection system at the bottom of the pit as recommended were not satisfactorily addressed. (Clark Tr. I-107-108, I-175.) Clark's review of the application was confined to the technical merits of the plans. (Clark Tr. I-111-112.)

3. On May 1, 1980 after the Director's determination that there was significant public interest in the proposed landfill, a public meeting was held. Attended by local, state and federal government representatives and private citizens, the witnesses presented oral and written statements seeking disapproval of the application. [See C.R. #11 (Transcript of the Public Meeting).] Numerous additional written comments and governmental resolutions voicing disapproval of uses inconsistent with plans for a national park were also submitted by the May 17,

1980 deadline for the submittal of written comments. (C.R. #12, 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 106, 107 and 108.)

4. Notwithstanding the recommendation for deferral by the Northeast District Office of Ohio EPA ("NEDO EPA") Section Chief and the testimony at the public meeting, plans for the landfill, as resubmitted on April 8, 1981, were approved by the Director on August 10, 1981. (C.R. #7.)

5. The permit site is located within the Cuyahoga River Valley and can be characterized as wooded. A wide diversity of flora and fauna have been identified or are expected to occur on the site. (Exhibit 18 at 45.) Except for a small section at the southeasterly area of the permit site (C.R. #6 at Sheet 4/18) all of the vegetation in the southern area of the permit site will be removed. (Coburn Tr. II-77-85; XV-31-33, 36.)

6. There are two streams within the permit site area. (See Exhibit 18 at page 30, Figure 3-4.) Hemlock Creek courses along the northwest side and the Easterly Stream flows through the southern portion of the permit site. (See Photo Exhibits 70, 71 and 72.) The Easterly Stream is a tributary to a larger stream (the "Southerly Stream") to the south which empties to the Cuyahoga River. (See Exhibit 18 at pages 12-18.)

7. The water quality of Hemlock Creek is classified as "good," and provides habitat for a number of aquatic organisms. The Easterly Stream exhibits excellent water quality with no significant organic pollutants and like the larger Hemlock Creek, the Easterly Stream provides habitat for several genera of organisms. (Exhibit 18 at 19-22.) Due to the biota present, the Easterly Stream on the permit site is perennial. (Collins Tr. V-177.)

8. The Cuyahoga River is the receiving water for Hemlock Creek and the Easterly Stream (via the Southerly Stream) and in the absence of the landfill these streams would be expected to provide high quality water to the Cuyahoga River. (Exhibit 18 at 28.)

9. The Easterly and Southerly Streams may be adversely impacted by the construction of the landfill. The Applicant will completely remove and relocate the Easterly Stream into a drainage ditch. (Collins Tr. III-180.) The relocation of the Easterly Stream and removal of cover material may cause an increase in water temperature, soil erosion, and in creased sedimentation which would have a harmful effect on the biota of the stream, perhaps killing them outright. (Collins Tr. III-182-185.) There are no provisions in the detail plans to control run-off to, or sedimentation of, the Southerly Stream on the adjacent properties which are a source of cover material. (Hasbrouck Tr. IX-16.) Also lacking is a drainage plan for the cover material stockpile areas (Coburn Tr. XV-13) and provisions for erosion or run-off control. (Coburn Tr. XV-44.)

10. The quarry and the remainder of the permit site are located within the Cuyahoga River Valley. (Exhibit 18 at page 3.) The principally mined rock-stratigraphic unit of this site is the Chagrin Shale member of the Ohio shale formation of the Devonian System. The Chagrin shale is overlain by the Bedford shale formation of the Mississippion system. The Bedford shale is interbedded with siltstone and sandstone (e.g., the Euclid Sandstone member) and outside the quarry area, the bedrock is covered by a veneer of glacial sediments. (C.R. #164.) According to bore hole data supplied in the permit application, the glacial materials are a mixed composite of clays, sands, and gravels of varying thicknesses and lateral extent. These may

appear as units of mixed material or lenses of sand or gravel or clay. (Exhibit 18 at 3-4.)

11. Although generally believed to be relatively impermeable, a recent study of the Chagrin Shale by Broadhead, et al. (Exhibit O) discloses that this formation contains seams or laminae of silt with secondary microfractures that may act as permeable conduits and reservoirs for the migration of liquids, gas and leachate. (Collins Tr. III-174-175; See also Exhibit 18 at 7-8.) The Banks Report, submitted in the Application (C.R. #3 at Exhibit 6A) confirms the existence of these fractured, silt zones. None of the Ohio EPA geologists who commented upon the suitability of the permit site were familiar with the Broadhead study published January, 1982, and did not consider the effect of the microfracture system on leachate or methane gas migration. These microfracture systems are detectable by precise "down hole" instruments or microscopic analysis of thin core sections. (Exhibit 18 at 7.) Such information was not provided by the Applicant. (Collins Tr. III-174.) On the basis of the most recent studies of the Chagrin shale, the Environmental Research Group, Inc., concluded that the permit site had severe limitations and was not presently suited for use as a landfill since the migration of groundwater, leachate and methane gas was highly probable. (Collins Tr. III-175-179; V-220; 234-236. Exhibit 18 at 8-11.) Conversely, Herron Testing Laboratories ("Herron") prepared a report for Boyas which concluded the permit site was feasible for a properly designed sanitary landfill and that adverse environmental impacts can be minimized by the provision of properly designed and constructed protective and drainage mechanism and by careful adherence to good sanitary landfill operational practices. (Exhibit 6 at 22.)

12. Bore holes completed by Herron in 1978 for Boyas consisted of eight bore holes from 29 to 49 feet in depth although the existing excavation for fill is 244 feet deeper than the higher elevations of the permitted area. Zones of water saturation, e.g., groundwater, were encountered in six of the eight borings at depths from 6.5 to 39.0 feet below ground surface. (Exhibit 18 at 5; See C.R. #3 at "Exhibit 6.") The Herron Report also confirms that ". . . with the exception of test positions 'G' and 'K' groundwater or seepage was encountered at all test positions within the proposed areas of development." (Exhibit 6 at 9; See also McKinney Tr. XII-26.) The report prepared, in 1969, by Professor Banks, for Hydraulic Press, also indicates the probable occurrence of water at the permit site and recommends that ". . . provision should be made for the probable necessity of removing accumulating water as the pit is deepened." (C.R. #3, Exhibit 6A at 17.) The Applicant, nor the Ohio EPA, did not test the groundwater for chemical quality and did not present flow data, a groundwater contour map or other hydrogeological data. (Exhibit 18 at 5.)

13. Observations of the site indicate that a pond of water is present in the lower-most section of the quarry which must be continuously removed through pumping. (Exhibit 18 at page 5.) Even in periods without rain, various areas of the quarry walls were observed as wet, indicating groundwater seepage. (*Id.;* See also, Photo Exhibits 98 to 104; Anderson Tr. VIII 136-141.) The fact that residential water wells exist within 1000 feet of the quarry confirms there is potable groundwater in the area. As indicated in the Herron Report (C.R. #3, Exhibit 6 at 4) there are also two other water wells within 1500 feet of the permit site. These water wells were not analyzed by the Applicant or the Ohio EPA.

14. The sudden cessation after many years of dewatering operations in the quarry prospectively will change any cone of depression that exists in the groundwater table for the area due to this pumping operation. The Herron Report suggested that the groundwater was perched but no tests were conducted to determine the extent of those water zones. (McKinney Tr. XII-29.)

15. Although requested by Mr. Clark (C.R. #44) the Applicant did not provide permeability tests of the floor and sides of the quarry. (C.R. #43 and 53.) This information is a critical aspect, bearing on the design of the landfill. (Steiner Tr. II-139.) As a result there was insufficient hydrogeologic and subsurface hydraulic data presented by the Applicant, or the Ohio EPA, to accurately determine the impact of the landfill on the local groundwater resources. (See Steiner Tr. II-131, 192, 198.)

16. The property which is the subject of the landfill and the adjacent areas where secondary cover material would be obtained is within the recognized boundaries of the CVNRA although the respective property is not a high priority for acquisition. (See Exhibit 20; Albert Tr. IV-4-5, 27.)

17. The land use of the area surrounding the permit site varies from residential to educational, recreational and commercial. The closest home is approximately 800-1000 feet from the landfill and the air in the neighborhood is reasonably clean and odorfree. (Semik Tr. VII-208; 213-214.)

18. The City's School Board owns and operates land laboratory facilities approximately 2300 feet from the permit site. (Guzi Tr. VI-151-154.)

19. The Berger Preserve is located on the south side of Hillside Road and is approximately 875 feet from the

permit site. (Guzi Tr. VI-176.) The School Board uses the Berger Preserve for educational purposes. (Guzi Tr. VI-159-160.)

20. The School Board also operates an elementary school on Hillside Road southwest of the permit site. (Harper Tr. VIII-108.) Part of the City's middle school facility is located approximately 1500 feet northwest of the permit site. (Harper Tr. VIII-101.) The School Board expressed opposition to the proposed landfill because of the adverse effects of the land laboratory. (Guzi Tr. VI-168.)

21. On September 22, 1978, the Board issued its Findings of Fact And Final Order on Remand in *City of Garfield Heights, et al. v. Ned E. Williams,* Case No. EBR 77-6-8-9-10-16-17, a case involving a contested permit for an extension of the existing Rockside Reclamation landfill in the City of Garfield Heights. The Rockside Reclamation landfill currently is a source of leachate and methane gas. (Photo Exhibits 8 thru 16; Steiner Tr. III-45-53.) The NEDO EPA has indicated that the Rockside Reclamation landfill has not been closed properly. (C.R. #167; Hasbrouck Tr. XVI-190.) Peter Boyas was the operator and executive officer of Rockside Reclamation landfill until his dissassociation from the corporation. The operator's reputation was challenged under O.A.C. 3745-27-06(H)(2) and (3) on the basis of his past association with Rockside Reclamation landfill, but the Agency appears to have made a determination the Applicant will be competent to operate the proposed landfill, notwithstanding the prior operations.

22. The purpose of the detailed plans are to integrate the engineering design with the physical features of the site and to provide a clear description of the construction and operation of the landfill. In reviewing an application

for a permit to install a sanitary landfill the Director is obligated to abide by the parameters set forth in O.A.C. 3745-31-05 and 3745-27-06 in issuing the permit. Section 3745-31-05 defines the criteria by which the Director is to base his decision. The provision, mandatory in its language, states in part:

> (A) The director shall not issue a permit to install unless on the basis of the information appearing in the application and information gathered by or furnished to the Ohio environmental protection agency, he determines that installation or modification and operation of the new source of air pollutants, new source treatment works, or solid waste disposal facility will:
>
> (1) Not prevent or interfere with the attainment or maintenance of applicable ambient water quality standards or ambient air quality standards; and
>
> (2) Not result in a violation of any applicable laws including, but not limited to, the laws governing:
>
> (a) Effluent standards adopted by the director or the administrator of the United States environmental protection agency
>
> (b) Emission standards
>
> (c) "Federal Standards of Performance for New Stationary Sources" adopted by the administrator of the United States environmental protection agency; and
>
> (3) Employ the best available technology; and

> (4) Not cause significant degradation of the air or water, if at the time of installation or modification either the ambient air or the receiving water meets or is better than applicable air or water quality standards.

Pursuant to Section 3745-27-06(A) of the O.A.C.:

> [S]uch detailed plans, specifications, and information shall be drawn up in a manner acceptable to the Director or his authorized representative in detail sufficient to allow a clear understanding and intelligent review thereof, and to provide assurance that the site or facility is designed and will be operated in accordance with these chapters, 3745-27 and 3745-37. The method of operation of the site or facility shall be described by the detailed plans, specifications and information with such detail and clarity as to be readily understandable by operating personnel at the facility.

23. Based upon the totality of the evidence submitted, the detailed plans do not measure up in an acceptable manner in several material respects.

24. As a normal occurrence the deposition of municipal, industrial and commercial wastes will result in the production of leachate at this site. (Exhibit 24; Exhibit 18 at 8; Steiner Tr. III-25-34; Exhibit 7 at 11-20; Exhibit 18 at 9.) The plans did not incorporate a state of the art leachate collection system or a system comparable to those currently being installed at other landfills, but in fact lacked any workable leachate collection system. (Steiner Tr. III-146; Clark Tr. I-173-174.)

25. The sump pump system and 54 inch steel pipe designed in the plans (C.R. #6, Sheet 7/18 and 7A/18) is inadequate as a leachate collection system. (Clark Tr.

I-173-175; Exhibit 7 at 29 and 32; Steiner Tr. II-134, 167.) This system was designed primarily as a means to remove any accumulated surface water that falls into the pit and is not a means for the removal of leachate. (Hasbrouck Tr. VII-80.) Mr. McKinney's description and explanation of the operation of the sump pump and 54 inch corregated pipe (Tr. XIII-60-62; 69-74; Exhibit 116) is quite different from the detail plans. [C.R. #6 at Sheets 7/18 and 7/18A, and Mr. Coburn's description, Tr. XV-120-121, 125.] No witness could testify with certainty why the sump pump had been moved from the bottom of the pit to a fixed position at elevation 610 M.S.L., 110 feet above the existing excavation's bottom and the lowest level of planned fill. [Coburn Tr. XV-127.] See also, Mr. Coburn's conflicting recollections at Tr. XV-122-125. The plans contain insufficient details as to how leachate will be addressed in the second and succeeding pits planned for other portions of the permit site. (Coburn Tr. XV-138.)

26. The settling basin, located at the northeast corner of the permit site, is an important part of the plans. (Hasbrouck Tr. VII-38.) The purpose of this settling basin would be to collect surface water or water that would be pumped out of the working area of the pit to be discharged to the southerly stream if "unpolluted" or trucked away to a treatment facility if contaminated. (McKinney Tr. XIII-39-40.) There is no provision for monitoring the accumulation of water in this settling basin or for its subsequent disposal. The plans do not describe in an acceptable manner the method for disposing of contaminated water or by what standards this determination is to be made. All but a small portion of the settling basin is located on Hydraulic Press property outside the

permit site which is not owned by the Applicant. (Coburn Tr. XIV-24; Hasbrouck Tr. VII-37, 88; See, C.R. #6 at Sheets 4/18, 7/18 and 7A/18.) Similarly, a portion of the erosion control dam is located partially off the permit site and no alternate provision is provided in the detail plans if Hydraulic Press does not permit the use of its property for the construction and operation of a settling basin. (C.R. #6 at Sheet 4/18.)

27. Leachate generation is an undesirable but unavoidable adverse byproduct of sanitary landfilling. (Exhibit 18 at 8; Exhibit 2 at 1-2; See Clark Tr. I-103.) This landfill will result in the production of leachate, probably containing heavy metals and toxics. (Steiner III-25.) The volume of leachate produced will depend on the amount of precipitation, the moisture content of the refuse, the biological processes of degradation, infiltration and evaporation rates. (Exhibit 18 at 8; Exhibit 24.) The Cleveland area has a high average precipitation rate of approximately 36 inches per year. Although disputed, Dr. Steiner testified that calculation techniques used by the U.S. EPA estimate volumes of leachate produced each day at the proposed landfill between 41,800 to 145,000 gallons. (Exhibit 24.) Since there is no leachate removal device for the lower 90-100 feet of the landfill the leachate must collect at the bottom and saturate the refuse or migrate out of the quarry into possible water sources, or the nearby Cuyahoga River. (Steiner Tr. III-25; Exhibit 18 at 9.) Migration of leachates into the groundwater table would have a significant and long-term adverse effect on public health.

Although requested by the Ohio EPA, no permeability test data was submitted regarding the floor and sidewalls of the quarry. (Coburn Tr. XIV-78; Steiner Tr. II-139.)

This information is necessary to determine the potential for vertical or lateral migration of leachate or methane gas. (Steiner Tr. II-156.) From the testimony, evidence and site visit, it is evident that water is infiltrating the pit in several areas. Active infiltration was confirmed by Oho EPA's geologist. (Khourey Tr. XVI-107, 108, 125.) Where water infiltration was encountered the Applicant proposes to seal off these areas by point placement on the sidewalls of a ten-foot impermeable barrier of clay. (McKinney Tr. XIII-76-77.) No data was submitted showing the permeability, particle size or compaction ratio of the cover material or the material to be used as a liner or plug against water infiltration. (Steiner Tr. II-148-149.) The amount or frequency of the appearance of sandy particles in the over-burdened soil would affect the permeability of the plugs used to cut off water intrusion. (Coburn Tr. XV-130.) The lack of soil test data leaves unresolved the question of the suitability of these soils as cover materials and use as plugs.

Since there is no footing for the clay seal and due to the expected settlement of the refuse underneath (Coburn Tr. XV-100; Steiner Tr. III-149), a ten-foot seal will, in all probability, sheer vertically at the wall interface. (Steiner XVII-151-152.) Loss of the clay seal will permit water to infiltrate the refuse, generating leachate, eventually saturating the landfill since there is no leachate removal system below elevation 610 M.S.L. The accumulation of leachate in this pit without positive drainage will increase the pressure on the quarry sidewalls and enhance the potential for leachate migration. (Exhibit 24.) Coupled with the lack of any leachate removal system, the design of the clay seal is inadequate and does not represent the best available landfill technology.

28. Although there is some information in the plans regarding the development of the present quarry area (C.R. #6 at Sheet 9/18), there is virtually no information regarding the development and operation of the second and succeeding pits to the south of the present pit. The relationship of the continued shale operations of Hydraulic Press and landfilling operations in the same area is not defined. The witnesses from the Ohio EPA were unsure of the direction of future development. Mr. Hasbrouck thought that the activities of Hydraulic Press and Boyas would all be in one enlarged pit. (Hasbrouck Tr. VII-47-49.) Mr. Coburn, however, indicated it was the intent of Mr. Boyas to prepare a succession of separate pits separated by a "highwall" (Coburn Tr. XIV-199) for Hydraulic Press' operations. (Coburn Tr. XIV-194-202.) As far as the Ohio EPA was concerned there was nothing in the plans or Application which indicated how the work would be sequenced or whether the two operations would compete for the same access roads. (Hasbrouck Tr. VII-51-52.) Mr. Hasbrouck conceded that the Ohio EPA does not know the plan for the development of the succeeding pits with respect to their depths, road development, or final elevation after landfilling.

29. The amount and quality of daily, intermediate and final cover material is an important aspect of a landfill's design. A material, such as ripped shale, sand or gravel, with a high permeability is unsuitable as a cover material since it would permit water to freely infiltrate the refuse as well as allow the escape of odors. Boring Logs "A," "B," "C," "D," "F" and "B-L" submitted by Herron Testing (C.R. #3 at Ex. 6) indicate that the overburden soils in the southern portion of the permit site consist of brown, gray and reddish-brown silty clays, sand, gravel and rock or shale fragments. (For location see Sheet 4/18 of the

Plans, C.R. #6.) Although the silty clays are acceptable for cover material, sand, gravel and rock or shale fragments are not acceptable.

30. The quantity of acceptable silty clay cover material on and near the permit site was disputed. The Ohio EPA calculated that the Applicant would need 850,000 cubic yards of cover material for this project. (C.R. #2 at page 11.) Both the Applicant and Ohio EPA agreed that the quantity of the overburden materials on the permit site would be only 700,000 cubic yards (C.R. #3 at Ex. 2) or 670,000 cubic yards (C.R. #2 at 11; C.R. #3 at page APP-F-4), respectively. Mr. McKinney calculated that the primary area would yield only 573,437 cubic yards. (McKinney Tr. XII-89.) Neither the Applicant nor the Ohio EPA calculated the quantity of acceptable silty clays available from the permit site overburden as contrasted with the unacceptable sand, gravel or rock and shale fragments noted on the boring logs. The mixing of the different overburden soils would not be reliable without a determination of permeability, which was not done.

31. While there are overburden soils on the parcel west of the permit site, the boring logs indicate a composite of silty clays, sand, gravel, shale or rock fragments and sandstone. [C.R. #3 at Ex. 6A (e.g., Borings B-6, B-8, B-9, B-10, B-11 and B-12).] No calculations were made by the Applicant or the Ohio EPA to demonstrate the quantity of acceptable silty clays from this area's overburden. It was assumed that everything was silty clay, which is contrary to the boring logs.

32. Limited test borings were provided by the Applicant for the "secondary cover material" area on the Hydraulic Press property to the east of the permit site. Three boring logs were made in 1969 by Professor Banks.

(C.R. #3 at Ex. 6A.) Borings H-2 and H-3 which are located within the secondary cover material areas (C.R. #6 at Sheet 4/18) show brown and gray clays, pieces of rock, gravel and gray shale. No acceptable silty clay is indicated on these two boring logs. Boring H-1 is not located in the designated secondary cover material areas. (See C.R. #6 at Sheet 3/18.) The Applicant did not demonstrate through sieve analysis, permeability tests, or otherwise that the composite materials in the secondary areas were acceptable.

33. There is no information in the Application or detail plans regarding drainage and erosion control in and around the secondary cover material areas. (Coburn Tr. XV-13, 44; Hasbrouck Tr. XVI-185.) No consideration was given to the effect of the cover material storage areas on nearby streams. (Hasbrouck Tr. XVI-185.)

34. The plans do not define the locations or final depths of the second and succeeding pits to be dug in the southerly portion of the permit site. Due to the depth of the existing pit and unknown depths of the pits in the southern area, there will be differing rates of settlement. (Steiner Tr. II-165.) The differing rates of settlement will breach the integrity of the final cover permitting the ponding or infiltration of surface waters which will lead to the generation of additional leachate. (Steiner Tr. II-159-160, 165.)

35. Upon examination of all the evidence presented, the Applicant's plans do not provide reasonable assurance that the location and operation of this landfill will not cause or contribute to groundwater or surface water pollution.

36. The Board notes that leachate is highly polluted, containing substances hazardous to human health and that

the inadequacy of the leachate collection system signifies a future health hazard resulting from water contamination both above and below surface.

37. Landfills have inherent problems of odor, noise, dust, blowing debris and vectors and, thus, have the potential for presenting nuisances to adjacent property. (Clark Tr. I-94; Exhibit 2 at page 1.) Not all of the problems associated with landfills have a method of control under current technology and it is difficult to provide assurances that any landfill will not be a nuisance when in operation. (Clark Tr. I-94; Hasbrouck Tr. IX-142.)

38. Due to potential nuisances, governmental bodies throughout the United States have implemented laws or regulations requiring a minimum isolation distance of 500 to 1320 feet to occupied dwellings. (Exhibit 2 at 9-10.) Literature sources recommend isolation distances of 500 to 1000 feet. (Exhibit 2 at 10; Steiner Tr. III-87.) Although Ohio regulations do not require it, the NEDO EPA has strongly recommended a minimum isolation distance of 1000 feet (Clark Tr. I-94-95; 142) or has used the 1000 foot minimum isolation distance as a general practice. (Hasbrouck Tr. IX-122.)

39. There are at least 12 homes on Hillside Road within 1000 feet of the permit site and, at some time, the active working face. (See, Exhibit 1 and E.)

40. Notwithstanding operation in accordance with the detail plans, the proposed landfill may be offensive to the senses, may interfere with the comfortable enjoyment of life and adjacent property, and may affect a considerable number of persons by reason of the emission of noise from vehicles and equipment coming to, leaving and working at the permit site. (E.g., Steiner Tr. III-14-16, 20, 152; Exhibit 7 at pages 6-8; Collins Tr. III-194, 197-199;

Exhibit 18 at pages 71-74; Exhibit 2 at 6-8.) Landfill noise levels can be objectionable and could adversely affect adjacent residents and visitors to the park. (Steiner Tr. III-16-20.) Although the expected noise levels would be attenuated when the equipment was down in the pit, Mr. Hasbrouck testified that construction noises at the surface from landfill equipment could be objectionable. (Hasbrouck Tr. IX-61.) The Applicant has not demonstrated an intent to utilize sound-suppressing equipment (Coburn Tr. XIV-107) and did not prepare or provide any noise studies, monitoring or calculations. (Coburn Tr. XV-93-94.)

41. It is well documented that a landfill attracts seagulls and pigeons in this area of the country. (E.g., Noice Tr. VI-186; Harper Tr. VIII-80, 83; Guzi Tr. VI-164; Exhibit B at 6.) The Applicant's witness confirmed the attraction of the seagulls and that the Applicant has no plan to control this problem. (Coburn Tr. XIV-102-103.)

42. The method control of blowing debris (4 ft. snow fences—C.R. #6 at Sheet 9/18) at the proposed site is not the best available current technology. (Coburn Tr. XIV-175; Exhibit 7 at 5.) Although landfilling in the depths of the quarry will mitigate blowing debris until operations reach the rim, debris from the garbage trucks using the site can be expected. (Exhibit 7 at pages 5-6; Steiner Tr. III-140, 152; Mansdorf Tr. IV-109.) Mr. Hasbrouck testified that there will be occasions when litter would blow from this site. (Hasbrouck Tr. XVI-158, 165.)

43. Methane gas production could create a serious hazard depending on the volume of gas generated and degree of lateral and upward movement. Exhibit 24 at at page 8.) The detailed plans do not include a method for the collection or venting of the methane gas that will inevitably be produced.

CONCLUSIONS OF LAW

1. Upon appeal the standard of review applied by the Board, pursuant to 3745.05 of the O.R.C., is whether the Director's actions were reasonable and lawful, as determined from the totality of the evidence presented before the Board upon the *de novo* hearing. *Citizens Committee to Preserve Lake Logan v. Williams,* 56 Ohio App.2d 61, 381 N.E.2d 661, Franklin County (1977). In elucidating this standard the Court stated:

> Where the evidence demonstrates that the action taken (granting the permit) by the director is reasonable and lawful—that is, the evidence reasonably supports the director's action—the board must, in accord with R. C. 3745.05, affirm the director even though it might have taken different action (denied the permit). The board initially does not stand in place of the director upon appeal and is not entitled to substitute its judgment for that of the director, but is limited to a determination of whether the action taken by the director is unreasonable or unlawful. Where the evidence demonstrates that it is reasonably debatable as to whether the permit should be granted, the board's duty is to affirm the director, rather than merely to substitute its judgment for his. If the board properly determines the action of the director to be unreasonable or unlawful, it then possesses power similar to that of the director, by way of vacating or modifying the action of the director to implement the appropriate action in accordance with the evidence. (*Citizens Committee v. Williams* (1977), 56 Ohio App.2d 61.

2. Some limited weighing of the evidence is required in order to determine whether an order is reasonable, particularly when it involves the determination of whether

a nuisance exists or a health hazard is created. *City of Garfield Heights v. Williams,* 77AP-449-454 (Franklin Cty. App., Unreported, Sept. 27, 1977).

As stated by the Court in *Lake Logan*:

> "Unlawful" means that which is not in accordance with law . . . . [and] "unreasonable" means that which is not in accordance with reason, or that which has no factual foundation. It is only where the board can properly find from the evidence that there is no valid factual foundation for the director's action that such action can be found unreasonable. Accordingly, the ultimate factual issue to be determined by the board upon the *de novo* hearing is whether there is a valid factual foundation for the director's actions and not whether the director's action is the best or most appropriate action, nor whether the board would have taken the same action.

3. The Director in determining whether to issue a PTI may consider the social and economic impact of granting or denying the PTI, O.A.C. 3745-31-05(B), but he is not required to do so. *Little Miami v. Williams,* 76-AP-285, 292 (Franklin Cty. App., December 23, 1976); *Kuzman v. McAvoy,* No. EBR 18793 (April 15, 1982).

4. The Director has discretion whether to consider and evaluate separate and distinct governmental interests such as those that are within the responsibility of local zoning officials, commissions, boards of appeal, other political subdivisions, and agencies of the State of Ohio or the United States of America in determining whether to issue a PTI. *City of Moraine v. McAvoy,* EBR 79-31-32, October 12, 1979; *City of Garfield Heights v. Williams,* No. 77AP-449, et al. (Franklin County App., September, 1977).

5. The Director is not required to consider the separate governmental interests of the United States of America in establishing the Cuyahoga Valley National Area (CVNRA), the Division of Reclamation, Ohio Departmental of Natural Resources in supervising surface mining permits or the zoning established by the Council of the City of Independence in determining whether to issue a permit to install a solid waste disposal facility. *City of Moraine v. McAvoy,* EBR 79-31-32; *Garfield Heights v. Williams,* No. 77AP-499.

6. The Ohio EPA does not have jurisdiction to change or affect local zoning by the issuance of a permit. Instead the permitted use continues to be subject to local zoning. That is not to say that the Director cannot take local zoning into consideration in determining whether a permit should be granted or whether action or hearings on a permit application should be stayed until local zoning is determined elsewhere. The Director is not required to hear an application for a permit where granting of the permit will in all likelihood be futile because of local zoning conflicts. *City of Garfield Heights v. Williams, Supra.* See also, *Hulligan v. Board of Zoning Appeals,* 59 Ohio App.2d 105, 392 N.E.2d 1272 (Lorain Cty. 1978). The fact the Director chose to review the permit is not in itself unreasonable.

7. Based on the totality of the evidence presented in the Certified Record and in the *de novo* hearing, the Board finds that the proposed landfill will not create a nuisance. This conclusion is premised upon the consideration of the topography of the area; the isolation of the solid waste disposal site from residential structures and areas used by the visitors of the CVNRA; the disruption of the area by shale mining and hadite processing; and the close proxi-

mity of industrial and commercial enterprises to the site coupled with the assumption the applicant will comply with the PTI and all other applicable rules and regulations.

In arriving at this conclusion the Board has tried to balance the right of a person to use and enjoy his property for any purpose he sees fit with the right that one is to use his property so as not to unreasonably injure the property or rights of his neighbors. The deleterious effects of a sanitary landfill are not without notice by the Board. The Board has attempted to determine the reasonableness of the action by weighing out the prospective harm. To establish a nuisance the evidence must demonstrate:

> . . . any thing which is injurious to human health or offensive to the senses; interferes with the comfortable enjoyment of life or property; and affects a community neighborhood, or any considerable number of persons (although the extent of annoyance or damage inflicted upon individual persons may be unequal). O.A.C. 3745-27-01 (N)

The test whether the proposed landfill constitutes a nuisance is whether reasonable persons would objectively regard the establishment of the proposed landfill as being unreasonable. It is the opinion of this Board that compliance with the PTI will provide protection against the creation of a nuisance. In addition, sufficient remedy to the creation of nuisance is available by filing a complaint pursuant to O.R.C. 3745.08. The Board finds that the dust, noise, odors, vectors and blowing debris are controllable and will not be injurious to human health or offensive to the senses, or interfere with the comfortable enjoyment of life and property or interfere with the use and enjoyment of surrendering property if operation of

the landfill is in accordance with the PTI and applicable laws and regulations pertaining to operation.

8. Pursuant to O.A.C. 3745-27-06(H)(2) and 3745-27-06(H)(3), respectively, it is unlawful for the Director to approve any detailed plan unless he determines in the case of plans submitted by a person who has previously operated a solid waste facility, such person has operated the facility in accordance with applicable provisions of O.R.C. Chapter 3734 and O.A.C. Chapter 3745-27, and further that the person identified as the operator of the solid waste disposal facility is competent and qualified to operate the solid waste disposal facility in accordance with O.R.C. Chapter 3734, O.A.C. Chapters 3745-27 and 3745-37. It is the opinion of the Board that although the operator's capability to operate the landfill in a lawful manner is disputed, the Agency has evaluated the operator's competence and made a judgment in favor of the operator. The Board will not substitute its judgment for that of the Agency where the Agency is fully aware of the operator's past record.

9. As required by O.A.C. 3745-27-06(H)(4), it is unlawful for the Director to approve any detail plans unless he determines that the solid waste disposal facility will be capable of operation in accordance with Regulation 3745-27-07, 3745-27-08 and 3745-27-09.

10. The Board finds that the failure to incorporate a leachate collection system utilizing best available technology in the plans will create a health hazard or cause water pollution in violation of Section 3745-27-07(H)(4) which the Director has a responsibility to prevent. In *City of Garfield Heights v. Williams*, 77AP-449-454, the Court noted that review of plans for the expansion of landfill operations is dependent upon expert testimony that indi-

cates the engineering plans are sufficiently clear and direct for intelligent review by the Director. A permit to install a sanitary landfill that is based upon plans, specifications and information lacking sufficient detail, to provide a clear understanding for intelligent review to assure that it is designed and will be operated in accordance with O.A.C. 3745-27-06, is unlawful. The expert testimony presented in the *de novo* hearing regarding the adequacy of these plans verified that the plans failed to comply with this test. The testimony, plans and evidence demonstrated gross inadequacies of the plan for the proposed permit to install a sanitary landfill. The Board finds that the proposed landfill will generate leachate presenting a substantial health hazard as well as a significant threat to groundwater resources and is not capable of operation in accordance with O.A.C. 3745-27-08(I).

11. The Director shall not approve the detailed plans if he determines the sanitary landfill is located in a floodway as prohibited by O.A.C. 3745-27-06(H)(5), or is not within a regulatory floodplain outside of the floodway as prohibited by O.A.C. 3745-27-06(I)(5). The evidence demonstrates that the landfill is not within the floodway, but it is located within the regulatory floodplain. An examination of the topography indicates there is a sixty-foot elevational difference between the landfill and the stream which mitigates the threat posed by a flood to the landfill. However, leachate migration in the same area does pose a serious threat to Hemlock Creek in the absence of a properly controlled leachate collection system. The plans call for the placement of "innocuous non-solid materials," a euphemism for construction wastes, within the 200-foot stream protection zone provided for by O.A.C. 3745-27-06(I)(5). These materials are highly

permeable and it can be expected that leachate will migrate from the landfill through these materials in the direction of the stream. The accumulation of leachate in the landfill will create pressure on the undisturbed eastern barrier, earlier identified as chagrin shale containing fractured silt zones conducive to the migration of liquids and gases, that exists between the landfill and the stream. Sheet ten of the detailed plans is an index to the site cross section which indicates that the undisturbed eastern barrier is at most approximately sixty to seventy feet in width. The accumulation of leachate in the landfill will exert enormous pressure on the east rn barrier such that there exists a substantial threat of le ate migration into Hemlock Creek.

12. Pursuant to the requirements of O.A.C. 3745-27-06 (I)(1)(4)(5) and of O.A.C. 3745-27-11(F) the grant of a waiver is suspect due to the inadequacy of the leachate collection system. Therefore, we do not rule upon the waiver at this time since it is impossible to evaluate its propriety in the absence of a leachate collection system design upon which the integrity of the waiver will depend.

13. As required by O.A.C. 3745-31-05,[1] the Director shall not issue a PTI unless on the basis of the information appearing in the application and information gathered by or furnished to the Ohio EPA, he determines that installation and operation of the solid waste disposal facility meets the criteria listed in O.A.C. 3745-31-05(A)(1), (2), (3) and (4). The evidence does not establish compliance with the criteria described in that regulation.

---

1. O.A.C. 3745-31-05 was amended by the Director's order of adoption issued on June 30, 1982, effective August 15, 1982. Since the PTI was issued on February 1, 1982 prior to the amendment, "old" Section 3745-31-05 applies here.

14. The evidence establishes that the proposed landfill will prevent or interfere with the attainment or maintenance of ambient water quality standards applicable to Hemlock Creek or the "easterly" and "southerly" tributaries of the Cuyahoga River. Plainly, there was no showing that the technology used is the best available technology as required under Ohio law. The plans fail to include a leachate collection system utilizing the best available technology that may cause significant degradation of water quality standards and would be a violation of other applicable laws.

15. Best available technology means the best available technology reasonably related to achieving and maintaining the desired level of environmental quality. *Little Miami, Inc. v. Williams,* Franklin Cty. App. Nos. 76AP-292, 76AP-285.

16. In the *City of Garfield Heights v. Williams,* 78AP-683 et seq. (Franklin Cty. Ct. of Appeals, Unreported, June 14, 1979; 1979 Decisions at 1493) the Court found that the establishment of a nuisance is an interference with the rights of adjacent landowners. The Court noted that the interference constituted an unlawful taking in the absence of compensation to the landowners. In the instant case, the Director's approval of a permit to install a sanitary landfill which fails to assure the protection of the water resources of the State is an unlawful interference with public health and safety.

17. The evidence establishes that the proposed landfill will result in violations of "applicable laws," e.g. Chapters 3704, 3734, 3745, and 6111 of the Ohio Revised Code, as amended; rules, regulations, and orders of the Ohio EPA; and the Federal Water Pollution Control Act, as amended.

18. The evidence establishes that the construction and operation of the landfill will be unlawful; that the discharge of "other wastes" from the settling basin into the waters of the state (e.g., Hemlock Creek or the "southerly" stream without a valid permit violates R.C. 6111.04 and O.A.C. 3745-33-02; and that the alteration and obliteration of the existing channel of the "easterly" stream violates the permit provisions of Section 404(a) of the Clean Water Act, 33 U.S.C. 1344.

19. Although testimony was provided regarding the effect of the proposed landfill on the CVNRA no action was taken on behalf of the federal government to join the action or to otherwise oppose the landfill. The evidence is insufficient to conclude that the action taken by the Director of Ohio EPA conflicts with federal policy.

FINAL ORDER

The final action of the Director of the Ohio Environmental Protection Agency granting a PTI to Mr. Pete Boyas, Boyas Excavating, Inc. is vacated in part, affirmed in part. The Director is ordered to require the Applicant to submit plans consistent with this decision, evaluate them and approve them prior to allowing any further action on this proposed landfill.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

> Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party de-

siring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of the order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL BOARD OF REVIEW

/s/ THOMAS PHILLIPS
Chairman

/s/ JAMES L. BAUMANN
Vice-Chairman

COPIES SENT TO:

CITY OF INDEPENDENCE (CERTIFIED MAIL)
ROBERT H. MAYNARD, DIRECTOR (CERTIFIED MAIL)
JOHN J. NICASTRO (CERTIFIED MAIL)
PETE BOYAS (CERTIFIED MAIL)

William H. Wallace, Esq.
Michael A. Syphert, Esq.
Deborah J. Nicastro, Esq.
Edward D. Hayman, Esq.
Joan M. Cummings, Esq.
Eli Manos, Esq.
Michael T. Gavin, Esq.

FINAL ACTION OF THE DIRECTOR OF ENVIRONMENTAL PROTECTION

(Entered February 1, 1982)

OHIO ENVIRONMENTAL PROTECTION AGENCY

Permit To Install
Application No. 02-899
Application Received 11-30-81 (Revised)
From Boyas Excavating, Inc.
Permit Fee: $500.00

Applicants Name: Mr. Pete Boyas, Boyas Excavating, Inc.

Address: 4100 Brookpark Road
City: Cleveland State: Ohio 44134
Telephone: (216) 398-3900

Name, Location and Description of Proposed Source:

Independence Development Sanitary Landfill
Located on South Side of Hemlock Road, West of the Cuyahoga River
City of Independence
Cuyahoga County
New Sanitary Landfill

Issuance Date: February 1, 1982

Effective Date: February 1, 1982

The above named entity is hereby ISSUED a permit approval (permit to install) for the above described source pursuant to OAC 3745-31. Issuance of this permit approval (permit to install) does not constitute expressed or implied approval or agreement that, if constructed and/or modified in accordance with the plans, specifica-

tions and/or information accompanying the permit application, the above described source of environmental pollutants will operate in compliance with applicable State and Federal laws and rules and regulations, and does not constitute expressed or implied assurances that if constructed and/or modified in accordance with those plans, specifications and/or information accompanying the permit application, the above described source of environmental pollutants will be granted the necessary operating permits and/or licenses. This permit approval (permit to install) is issued subject to the following attached conditions which are hereby incorporated and made a part hereof.

Ohio Environmental Protection Agency
/s/ WAYNE S. NICHOLS
by Wayne S. Nichols
Director
361 East Broad Street
Columbus, Ohio 43215

Boyas Excavating, Inc.
Mr. Pete Boyas
February 1, 1982

PTI CONDITIONS

Substantial construction for installation must take place within eighteen months of the effective date of this permit. This deadline may be extended by up to twelve months, if application is made to the Director no less than sixty days before the expiration of this permit and the party shows good cause for any such extension.

The Director of the Ohio Environmental Protection Agency, or his authorized representatives, may enter upon the premises of the above named applicant during construction and operation at any reasonable time for the purpose of making inspections, conducting tests, examining records or reports pertaining to the construction, modification or installation of the above described source of environmental pollutants.

The proposed source shall be constructed in strict accordance with the plans and application submitted for this permit to the Director of the Ohio Environmental Protection Agency. There may be no deviation from the approved plans without the express, written approval of the Agency. Any deviations from the approval plans or the above conditions may lead to such sanctions and penalties as provided under Ohio law. Approval of these plans does not constitute an assurance that the proposed facilities will operate in compliance with all Ohio laws and regulations. Additional facilities shall be installed upon orders of the Ohio Environmental Protection Agency if the proposed sources are inadequate or cannot meet applicable standards.

This approval shall apply only to those facilities shown on the plans cited above.

That payment of the required five hundred dollar ($500.00) permit-to-install fee, payable to the Treasurer of the State of Ohio, is forwarded to the Division of Land Pollution Control, Ohio EPA, P. O. Box 1049, Columbus, Ohio 43216, within 15 days of the effective date of this permit. Failure to submit the fee will invalidate the PTI.

The approval of this landfill anticipates completion within eight to ten years. This approval shall be considered to be valid for a period of twelve years following the date the landfill is licensed and ready to accept wastes. The landfill shall be completed on or before the expiration of this period.

A report, which provides a technical appraisal of the results obtained during normal operating conditions of the new facilities, shall be submitted to the appropriate District Office of the Ohio Environmental Protection Agency no later than three months after the new facilities are placed into operation.

The solid waste disposal site or facility shall be completed and ready for operation before the acceptance of solid wastes. Notification that this condition has been met shall be submitted in writing to the appropriate District Office of the Ohio Environmental Protection Agency at least thirty (30) days prior to the acceptance of any solid wastes.

That before any wastes are brought into this site the following must be accomplished:

a. The adequacy of the Stone Road bridge over the Ohio Canal and the Cuyahoga River must be authorized by the Cuyahoga County Engineer.

b. The interim access roadway from Hemlock Road to the bottom of the pit must be completed.

c. An office with electricity, drinking water, toilet facilities, and a telephone must be available.

d. The other portions of the plans applicable for start-up (including the sump pumps and settling basin), must be completed.

Wastes taken into the site shall use the Rockside Road, Canal Road, Stone Road route and shall not come into the landfill from the west via Hemlock or Stone Road or from the south via Canal Road unless the trucks contain refuse picked up from communities through which these roads traverse.

The owner shall provide for the proper maintenance and operation of the solid waste disposal site or source in accordance with the provisions of Chapter 3745-27 of the Ohio Administrative Code.

Daily records of operation shall be maintained and submitted to the Ohio Environmental Protection Agency monthly.

The local health department having jurisdiction shall be notified prior to start of construction so that construction of this project can be routinely inspected and approved by the local health department before being placed in operation.

That prior to acceptance of wastes, all five monitoring wells shown on the plans plus two additional wells on the east side will be established, initial samples taken for the following parameters, and that such samples will be taken, analyzed at the owners expense by a certified laboratory, and reported to the Ohio EPA on a semi-annual basis (or at more frequent intervals if deemed necessary by the Ohio EPA). Information on each well shall include the following data and analysis:

a. The depth of the well

b. The static water level in the well

c. The ground elevation at the top of the well

d. Analysis of the groundwater should be performed for the following parameters with units indicated:

1. Temperature, °C
2. Conductivity, micro mhos 25°C
3. pH, S.U.
4. Total Alkalinity, mg/1
5. Ammonia Nitrogen, mg/1
6. Total Kjeldahl Nitrogen, mg/1
7. Nitrate Nitrogen, mg/1
8. Sulfate (SO_4)
9. Chloride (Cl)
10. Total Dissolved Solids (TDS)
11. Calcium (Ca)
12. Magnesium (Mg)
13. Sodium (Na)
14. Iron (Fe)
15. Chemical Oxygen Demand (COD)
16. Total Organic Carbon (TOC)
17. Methylene Blue Active Substances (MBAS)

Water pumped from the sedimentation basin for discharge on the site shall not violate Ohio Water Quality Standards and, in addition, shall not exceed the following specific water quality criteria:

TDS	1500 mg/1	Phenols	10 ug/1
TSS (see note A)		Cd	12 ug/1
BOD	10 mg/1	Cu	50 ug/1
COD	40 mg/1	Cr	100 ug/1
NH_3	2.5 mg/1	Fe	1000 ug/1
Total Phosphorus	1.0 mg/1	Hb	0.2 ug/1
MBAS	.5 mg/1	Pb	30 ug/1
		Zn	175 ug/1

A. The TSS shall not exceed 30 mg/1 or the TSS of the receiving stream at the time of discharge, whichever is greater.

The nine locations of the corners and turning points of this 31.227 acre property shall be established and clearly identified prior to the start of the landfill and such markings shall be maintained throughout the life of the landfill.

No sludges or liquids shall be accepted for disposal without the written approval of the Agency.

If leachate is detected on the site, or is draining from the site, in such quantities that the Director or his authorized representatives or the Health Commissioner believes, based on a review of geologic, hydrologic, engineering, and other factors, that a substantial threat of water pollution exists, the leachate shall be contained on the site and properly treated or shall be collected and transported from the site for proper treatment and all necessary action shall be taken to minimize, control or eliminate the conditions which contribute to the production of leachate.

This solid waste disposal site has need of continued maintenance care until the decomposition in the fill has stabilized. The owner of this site shall be responsible for the continued care of the site as specified in OAC 3745-27-10.

That during the time period covering the initial construction, continued operation and closure of this landfill the owner shall provide a registered Ohio professional engineer to supervise the construction and operation of the landfill in compliance with the approved plans, specifications, and operating procedures. Within thirty (30) days of the completion of each phase of this landfill, or annually on July 1, a certification shall be made by the design engineer that that part of the landfill was constructed in accordance with the approved plans; said certification to be forwarded to the Northeast District Office of the Ohio EPA.

The lowest level of excavation for landfilling on this 31.227 acre parcel is set at 525′ M.S.L.; the maximum elevation of fill and intermediate or final cover is to be 703′ M.S.L.

WAIVER: Pursuant to OAC Rule 3745-27-11, there is hereby granted a WAIVER of OAC Rule 3745-27-06(I)(4) and OAC Rule 3745-27-06(I)(5) in accordance with detailed plans approved by the Director and in accordance with the terms and conditions listed below.

Terms and conditions:

a. That construction and operation be strictly held to procedures and techniques outlined in detail plans and specifications.

b. That the four (4) water wells on Boyas' owned property north side of Hemlock Road are to be properly abandoned as a water supply source prior to the start-up of the landfill.

c. That the small waterway currently flowing from west to east and crossing the C.E.I. right-of-way approximately 1100′ south of the intersection of Hemlock Road and this C.E.I. right-of-way, be relocated

and diverted into the perimeter drain system, per plans.

d. That this WAIVER shall be REVOKED, if, as determined by the Director, the granting of said WAIVER causes water pollution, creates a nuisance or health hazard or if any term or condition of this WAIVER is violated.

END OF CONDITIONS

No. 85-1084

FILED
FEB 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.,

Petitioners,

vs.

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT FRANKLIN COUNTY, OHIO

BRIEF OF RESPONDENT PETE BOYAS, ETC. IN OPPOSITION

ELI MANOS, *Counsel of Record*
MICHAEL T. GAVIN
MANSOUR, GAVIN, GERLACK & MANOS Co., LPA
2150 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 523-1500

Attorneys for Respondents, Pete Boyas, Independence Development Sanitary Landfill, and Boyas Excavating, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

12 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE OHIO DIRECTOR OF ENVIRONMENTAL PROTECTION MUST DECLINE TO REVIEW AND APPROVE PLANS FOR A SANITARY LANDFILL ON LAND IN THE VICINITY OF A NATIONAL PARK.

2. WHETHER A STATE COURT REVIEWING AN ADMINISTRATIVE DECISION CONCERNING PLANS TO INSTALL A SANITARY LANDFILL ON LANDS IN THE VICINITY OF A NATIONAL PARK MUST ORDER THE PLANS REJECTED BECAUSE CONGRESS, TWO AND ONE-HALF YEARS AFTER THE PLANS WERE REVIEWED BY THE AGENCY, ENACTS LEGISLATION THAT MAY OR MAY NOT PERTAIN TO THE FACILITY IF CONSTRUCTED.

TABLE OF CONTENTS

Questions Presented for Review I
Table of Authorities II
Constitutional Provision Involved 1
Statutory Provisions Involved 2
Statement of Facts 5
Reason Why the Writ Should Be Denied 6
The Issues Raised by Petitioners Were Not Capable of Adjudication in the Forums Below, Were Not Finally Determined Below, and Are Not Ripe for Adjudication by This Court 6
Conclusion 9

TABLE OF AUTHORITIES

Cases

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 6
Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922) 7

Constitutional Provisions & Statutes

U.S. Const., Art. I, §8, cl. 17 ..... 1, 8
16 U.S.C. §1c(a) 2, 7
16 U.S.C. §460ff 7
16 U.S.C. §4601-22(C), Public Law 98-506 ..... 6, 8
40 U.S.C. §255 ..... 2, 8
Ohio Rev. Code §§159.03-159.05 ..... 3-4, 8
Ohio Rev. Code §3745.06 ..... 5, 8

No. 85-1084

In the Supreme Court of the United States

October Term, 1985

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.,

Petitioners,

vs.

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT FRANKLIN COUNTY, OHIO

BRIEF OF RESPONDENT PETE BOYAS, ETC. IN OPPOSITION

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Article I, Section 8, Clause 17:

The Congress shall have Power . . .

* * *

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may be, by Cession of particular

States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

STATUTORY PROVISIONS INVOLVED

United States Code, Title 16: Section 1c(a) National park system: administration; declaration of findings and purpose; general provisions—Definition:

The "national park system" shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.

Title 40: Section 255 Title to land to be purchased by United States; acquisition by United States of jurisdiction over lands:

. . . but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a

notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

Ohio Revised Code, §159.03 Consent of state given to acquisition by United States of land required for government purposes:

The consent of the state is given, in accordance with clause 17, Section 8, Article I, United States Constitution, to the acquisition, between May 6, 1902, and the effective date of this amendment, by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government. On and after the effective date of this amendment, the consent of the state is given, in accordance with clause 17, Section 8, Article I, United States Constitution, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this state required for sites for national parks, national monuments, or national recreational areas provided acquisition of such land commenced prior to the effective date of this amendment.

Ohio Revised Code, §159.04 Exclusive jurisdiction over land ceded to the United States; exceptions; retrocession:

(A) Exclusive jurisdiction in and over any land acquired by the United States under section 159.03

of the Revised Code is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state. The jurisdiction so ceded shall continue no longer than the said United States owns such lands.

(B) The governor may accept, on behalf of the state, retrocession of full or partial jurisdiction over any roads, highways, or other lands in federal enclaves where the appropriate federal authority offers the retrocession. The governor shall deliver the documents executed by the federal authority and the governor concurring in the retrocession, for recording, to the office of the recorder of the county in which the lands are located.

Ohio Revised Code, §159.05 Jurisdiction shall vest; voting:

The jurisdiction ceded under section 159.04 of the Revised Code shall not vest until the United States has acquired title to the lands by purchase, condemnation, or otherwise. As long as the lands whose acquisition is consented to by section 159.03 of the Revised Code remain the property of the United States they are exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state. Sections 159.03 to 159.06 of the Revised Code do not prevent any officers, employees, or inmates of any national asylum for disabled volunteer soldiers located on any such land over which jurisdiction is ceded, who are qualified voters of this state from exercising the right of suffrage at all township, county, and state elections in any township in which such national asylum is located.

Ohio Revised Code, §3745.06 Appeals to courts of appeals.

> Any party adversely affected by an order of the environmental board of review may appeal to the court of appeals of Franklin County, . . .
>
> * * *
>
> In hearing the appeal, the court is confined to the record as certified to it by the board.

STATEMENT OF FACTS

On February 1, 1982, the Director of Environmental Protection of the State of Ohio ("Director") issued a permit to install a sanitary landfill to Boyas Excavating, Inc. ("Boyas") on a site in the City of Independence, Ohio composed of 31 acres, 17 acres of which is a hole 225 feet deep created by the mining of shale by the Hydraulic Press Brick Company ("Hydraulic").

Petitioners appealed the action of the Director to the Environmental Board of Review ("Board"). Among Petitioners' 25 assignments of error was one which contended that the action of the Director was unlawful in that Congress had pre-empted his authority to issue the permit by creating the Cuyahoga Valley National Recreation Area ("Park"). The site is depicted upon the boundary map of the Cuyahoga Valley National Recreation Area. The site is located in an industrial area along a narrow corridor that leads to the main body of the Park. The Board overruled that assignment of Petitioners, finding that the site was so isolated from the Park that a sanitary landfill located there would have no impact upon the Park (Petition, A54). Petitioners appealed to the Franklin County Court of Appeals. While the appeal was pending, Congress

enacted Public Law 98-506, set forth at page 5 of the Petition, regulating the operation of a landfill within the boundary of any unit of the National Park System. Petitioners filed a supplemental brief, arguing that the enactment of Public Law 98-506 required the court to overrule the Board and to invalidate the action of the Director. The court rejected the argument of Petitioners, holding that it was confined by statute to the record of the proceedings below, which did not include consideration of Public Law 98-506, that the Director and Board were confined by state law to consideration only of environmental factors, and that the argument raised by Petitioners was properly addressed in another forum (Petition, A10-11). Citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the court held that the creation of the Park could not be construed to pre-empt state law.

Petitioners appealed to the Supreme Court of Ohio, which declined jurisdiction. Thereupon, they filed this Petition.

REASON WHY THE WRIT SHOULD BE DENIED

THE ISSUES RAISED BY PETITIONERS WERE NOT CAPABLE OF ADJUDICATION IN THE FORUMS BELOW, WERE NOT FINALLY DETERMINED BELOW, AND ARE NOT RIPE FOR ADJUDICATION BY THIS COURT.

Petitioners urge that the Ohio law establishing the Environmental Protection Agency and ascribing to it its duties was pre-empted by the Federal legislation establishing the Park and that the Director was proscribed from even reviewing plans for a landfill in the vicinity of

the Park by the Congressional action establishing the Park. The employees of the Director reviewing the plans were engineers and geologists. Their training and responsibilities are technical. In their opinion the site, consisting of a hole encapsulated by relatively impermeable shale, made an ideal landfill site. The Director and his staff either were unaware of petitioners' proposition or rejected it. The Board, in its Fifth Conclusion of Law (Petition, A54) held that the Director was not required to resolve the question. The Court of Appeals held that the legislation establishing the Park neither expressly nor impliedly pre-empted jurisdiction of the state over lands not acquired by the United States (Petition, A10).

Petitioners' premise is wrong. We submit that the site is not in the Park. A unit of the National Park System is defined at 16 U.S.C. §1c(a) as land and water administered by the Secretary of the Interior through the National Park Service. 16 U.S.C. §460ff (Petition, p. 3), the enabling legislation for the Park, specifically states that the Hydraulic property, when acquired "shall be administered as part of the recreation area". Not only has the property not been acquired, but as pointed out by the Court of Appeals (Petition, A9), a representative of the National Park Service testified before the Board that the Service did not intend to acquire the Hydraulic property and had no use for the pit. Congress established the Park but the Hydraulic property is not owned or administered by the Park Service.

As pointed out by the Court of Appeals (Petition, A10), a serious constitutional question arises if the United States of America declines to acquire the property, but accomplishes its purpose through regulation. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Ob-

viously, a state administrative proceeding is not an appropriate forum to consider a Fifth Amendment compensation claim.

Nor was that forum appropriate to consider the jurisdictional prerogatives of the United States and the State of Ohio. The Constitution provides in clause 17 of Section 8 of Article I that Congress may exercise authority over lands purchased in a state with the consent of the legislature of the state. Ohio, through the enactment of R.C. §§159.03 to 159.05, granted consent for the acquisition of lands for the Park, but specifically ceded jurisdiction to the United States only over those lands actually acquired by it. As the Court of Appeals pointed out (Petition, A9), the Secretary of the Interior has not utilized the procedures provided by 40 U.S.C. §255 to obtain jurisdiction from the state over lands not acquired by him and is administering only those lands actually acquired.

Public Law 98-506, 16 U.S.C. §4601-22(C), enacted two and a half years after the permit was issued, is not relevant to these proceedings. The Court of Appeals, in its review of the action of the Board, is restricted by Section 3745.06 of the Ohio Revised Code to the record certified by the Board. Since Public Law 98-506 had not been enacted at the time of the hearing before the Board, it was not even considered by the Board.

The Administrative agencies of the State of Ohio declined to adjudicate and determine the interests of the United States as advocated by Petitioners. Presentation of those contentions is appropriately made by the United States as a party in a forum competent to adjudicate them.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ELI MANOS, *Counsel of Record*
MICHAEL T. GAVIN
MANSOUR, GAVIN, GERLACK & MANOS Co., LPA
2150 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 523-1500

Attorneys for Respondents, Pete Boyas, Independence Development Sanitary Landfill, and Boyas Excavating, Inc.

Supreme Court, U.S.
FILED
FEB 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1084

In The Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF INDEPENDENCE, ET AL.,
Petitioners,

v.

WARREN W. TYLER,
DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT WARREN W. TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION, STATE OF OHIO, IN OPPOSITION

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

JOAN C. WEISER
Counsel of Record
Environmental Enforcement Section
Fountain Square, D-2
Columbus, Ohio 43224
(614) 265-6887
Attorney for Respondent

JEFFERY C. HOUSE
Assistant Attorney General
Environmental Enforcement Section
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-2766
Of Counsel

15 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE DIRECTOR OF ENVIRONMENTAL PROTECTION, STATE OF OHIO, MUST REFRAIN FROM CONDUCTING A REVIEW PURSUANT TO STATE LAW OF DETAIL PLANS FOR A SANITARY LANDFILL ON LAND WHICH, IT IS ARGUED, IS WITHIN THE BOUNDARIES OF A UNIT OF THE NATIONAL PARK SYSTEM, AND WHERE SUCH STATE ACTION IS SPECIFICALLY PERMISSIVE IN CHARACTER AND EXPRESSLY SUBORDINATE TO APPLICABLE FEDERAL LAWS, RULES AND REGULATIONS?

PARTIES

Petitioners:

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.

Respondents:

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI	3
I. THE STATE PERMIT IS NOT CONTRARY TO OR IN CONFLICT WITH FEDERAL LAW	4
II. THE SITE MAY NOT BE SUBJECT TO ANY FEDERAL LAND USE LAW	6
III. FEDERALLY-CREATED RIGHTS AND REMEDIES ARE UNAFFECTED BY THE DIRECTOR'S ACTION	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Cases:

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 4, 5

Constitutional Provisions:

U.S. CONST. art. VI, cl. 2 3

Statutory Provisions:

16 U.S.C. Sec. 1c(a) 6
16 U.S.C. Sec. 460ff-1(a) 4, 5, 6, 7
16 U.S.C. Sec. 460L-22(c) 3, 5, 6

CASE NO. 85-1084

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CITY OF INDEPENDENCE, ET AL.,
Petitioners,

v.

WARREN W. TYLER,
DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT WARREN W. TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION, STATE OF OHIO, IN OPPOSITION

Warren W. Tyler, Director of Environmental Protection, State of Ohio, respectfully requests that this Court deny the petition for a writ of certiorari, filed by the City of Independence and others, seeking to review the judgment of the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Constitutional Provision:

The Supremacy Clause to the Constitution of the United States, art. VI, cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

This case raises the question of whether the United States of America has prohibited the Director of Environmental Protection, State of Ohio, from reviewing detail plans for a sanitary landfill as required by state law where such a landfill is sited on land which, it is argued, is within the boundaries of a unit of the National Park System, and where such state action is specifically permissive in character, and expressly subordinate to applicable federal laws, rules and regulations.

A. Procedural History.

On Feburary 1, 1982, the Director of Environmental Protection, State of Ohio ("Director"), issued to Mr. Pete Boyas, d/b/a Independence Development Sanitary Landfill, Boyas Excavating, Inc., ("Boyas") a permit to install ("Permit") a sanitary landfill at a shale mining site in the City of Independence, Cuyahoga County, Ohio. The permit expressly provided that the approval granted therein was subject to the requirements of applicable federal laws. The City of Independence and John J. Nicastro on behalf of the Save Our Independence Land Committee, and John J. Nicastro on behalf of the Independence Homeowners-Citizens Association, Inc., (collectively "City") appealed the Director's action to the Environmental Board of Review, State of Ohio ("Board"). On April 1, 1983, the Board issued a decision and order substantially upholding the Director's action, and concluded that the Director was not required to consider the land use interests of the United States of America in issuing the permit.

The City appealed the Board's decision to the Court of Appeals, Tenth Appellate District, Franklin County, Ohio ("Court of Appeals") which substantially affirmed the Board's decision and order and determined that neither the Director nor Board was required to prohibit the landfill under the United States of America park land use laws, to the extent such may apply

The Supreme Court of Ohio declined to consider the merits of the City's appeal.

B. Relevant Facts.

The Permit site is a shale quarry, seventeen acres in area and two hundred twenty feet deep. It was omitted from the original legislation designating the boundaries of the Cuyahoga Valley National Recreation Area ("CVNRA"), although it was included in a 1978 modification to the law. The actions of the Director and Board preceded passage of Public Law 98-506, codified at 16 U.S.C. Section 460L-22(c). Public Law 98-506 prohibits the operation of commercial landfills in National Park System units in some particular settings.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

There is no conflict between the Director's permissive act and the federal land use laws cited by the City, even if such laws are applicable. The Director's act merely authorizes landfill construction in the context of Ohio's environmental laws. The Permit does not excuse Boyas' compliance with federal land use laws. The lower forums consistently and correctly concluded that the Director's permissive act was not contrary to prohibitory federal law of dubious applicability. Because the City has not and cannot demonstrate a direct conflict between state administrative action and federal land use law, no genuine issue concerning the Supremacy Clause to the Constitution of the United States Art. VI, cl.2, exists. Therefore the City's petition must be denied.

I. THE STATE PERMIT IS NOT CONTRARY TO OR IN CONFLICT WITH FEDERAL LAW.

The Director administers state environmental laws, and in harmony therewith reviewed the technical and scientific aspects of Boyas' application. In issuing the Permit, the Director stated:

> Issuance of this permit approval (permit to install) does not constitute expressed [sic] or implied approval or agreement that, if constructed and/or modified in accordance with plans, specifications and/or information accompanying the permit application, the above described source of environmental pollutants will operate in compliance with applicable State and Federal laws and rules and regulations, ...(Appendix to City's petition, A62-63.)

Of the federal statutes in effect at the time of the Director's action, the only one cited by the City in its petition was the law creating the CVNRA, Public Law 93-555, Section 1, codified at 16 U.S.C. Section 460ff-1(a) et. seq. The general intent of Congress expressed therein was "preserving and protecting for public use and enjoyment, the historic, scenic, natural and recreational values of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and for the purpose of providing for the maintenance of needed recreational open space necessary to the urban environment. . ." 16 U.S.C. Section 460ff-1(a)

It is well-settled that the intent of the United States Congress to pre-empt state activity is one which can arise only where specific Congressional intent can be adduced. This Court in 1981 rejected an argument that the State of Montana was pre-empted through the Supremacy Clause from levying a severance tax on coal mined in Montana (including coal mined on federally owned land) and in *Commonwealth Edision Co. v. Montana,* 453 U.S. 609 (1981), declared:

> We do not, however, accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal. In *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978), we rejected a pre-emption argument similar to the one appellants urge here. There, it was argued that the "basic national policy favoring free competition" reflected in the Sherman Act pre-empted a state law regulating retail distribution of gasoline. *Id.,* at 133, 98 S. Ct., at 2217. The Court acknowledged the conflict between the state law and this national policy, but rejected the suggestion that the "broad implications" of the Sherman Act should be construed as a congressional decision to pre-empt the state law. *Id.,* at 133-134, 98 S. Ct., at 2217-18. *Cf. New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 439 U.S. 96, 110-111, 99 S. Ct. 403, 412-413, 58 L. Ed. 2d 361 (1978). As we have frequently indicated, "(p)re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *** In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict. *Commonwealth Edison Co. v. Montana,* 453 U.S. at 633-34.

Public Law 93-555, codified at 16 U.S.C. Section 460ff-1(a) et. seq., is by no stretch of the imagination an expression of clear congressional intent to bar the State of Ohio from making its environmental assessment of a proposed lanfill.

Public Law 98-506, Section 2, codified at 16 U.S.C. Section 460L-22(c), was enacted more than two years after the Director's action. Its inapplicability through timing is apparent.

However, even if it did apply, Public Law 98-506 speaks to operation of a landfill site, and does not expressly prohibit state review of scientific environmental considerations for constructing a site.

II. SITE MAY NOT BE SUBJECT TO ANY FEDERAL LAND USE LAW.

This particular Permit site has the peculiar distinction of being specifically subject to the administration of the Secretary of the Interior ("Secretary") "when acquired". At Public Law 93-555, codified at 16 U.S.C. Section 460ff-1(a) the Congress stated:

> After advising the Committees on Interior and Insular Affairs of the United States Congress, in writing, the Secretary may make minor revisions of the boundaries of the recreation area when necessary by publication of a revised drawing or other boundary description in the Federal Register. *Provided,* that with respect to the property known as the Hydraulic Brick Company located in Independence, Ohio, the Secretary shall have the first right of refusal to purchase such property for a purchase price not exceeding the fair market value of such property on the date it is offered for sale. *When acquired* such property shall be administered as part of the recreation area, subject to the laws and regulations applicable thereto. (Emphasis added.)

16 U.S.C. Section 1c(a) defines a unit of the National Park System as land and water administered by the Secretary through the National Park Service. Because 16 U.S.C.A. Section 460ff-1(a) makes the Secretary's administrative duties contingent upon this particular site's acquisition, it is quite doubtful that the site has achieved the status of a National Park System unit such as would subject it to the operation of 16 U.S.C. Section 460L-22(c).

It is thus apparent that the regulatory status of the Permit site in the context of federal land use laws is uncertain. Facing the conflicting assertions of Boyas and the City on this issue, the Director refused to base his determination of the permit application's merits on federal land use laws. He prudently analyzed the matter on the basis of the technical merits, and left the determination of the applicability of the federal land use prohibitions to the appropriate federal forum.

III. FEDERALLY-CREATED RIGHTS AND REMEDIES ARE UNAFFECTED BY THE DIRECTOR'S ACTION

It cannot be said that the Director's action is contrary to federal land use law or federal legislative goals. If the federal laws themselves are sound and in fact apply to site usage, an injunctive remedy in federal district court is available to prohibit the landfill.

The Director is required by state law to explore and resolve the technical environmental questions raised by Boyas' permit application. In the natural exercise of his authority, the Director declined to consider the applicability of Public Law 93-555, and the interests of the Secretary in administering lands within the National Park System. The Director correctly confined his analysis to the area of his expertise.

The Director perceived no conflict between issuance of the Permit and potential federal land use prohibitions, a perception consistently shared at all levels of appeal. As the Court of Appeals noted:

> "The question of the applicability of a federal statute to the use of land within a federal park system and the question of the cession of authority from Ohio over lands not acquired by the federal government should be resolved in a proceeding initiated by the appropriate federal agency". Appendix to City's petition at A11.

The interests of the Director in executing his duties to protect the environment, and the interests of the Secretary in protecting land use in National Park System units, are harmonious in this case. Each official acts to perform such duties in the context of his expertise.

It must be noted that the Secretary did not intervene in the state proceedings, nor has he initiated action in federal district court.

CONCLUSION

For all the foregoing reasons, the Court should deny the petition for a writ of certiorari to the Court of Appeals, Tenth Appellate District, Franklin County, Ohio.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

JOAN C. WEISER
Counsel of Record

Environmental Enforcement Section
Fountain Square, D-2
Columbus, Ohio 43224
(614) 265-6887

Attorney for Respondent

JEFFERY C. HOUSE
Assistant Attorney General

Environmental Enforcement Section
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-2766

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by depositing same in a United States post office, with first class postage prepaid, this _____ day of February, 1986, to each of the following:

William H. Wallace
Thompson, Hine and Flory
1100 National City Bank Bldg.
Cleveland, Ohio 44114

Counsel for Petitioners

Michael T. Gavin
Mansour, Gavin, Gerlack & Manos Co., L.P.A.
2150 Illuminating Bldg.
55 Public Square
Cleveland, Ohio 44113

Counsel for Respondents Pete Boyas. Independence Development Sanitary Landfill, and Boyas Excavating, Inc.

JOAN C. WEISER
Assistant Attorney General